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MICHAEL RODAK, JR., CL

Case No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

QUESTION PRESENTED

WHETHER THE DOUBLE CELLING OF PRISON INMATES CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHERE THE RECORD INDICATES THAT THE PRACTICE DOES NOT DEPRIVE INMATES OF MINIMUM CONSTITUTIONAL GUARANTEES TO ADEQUATE FOOD, CLOTHING, SHELTER, SANITATION, MEDICAL CARE AND PERSONAL SAFETY.

PARTIES

The petitioners in this action are James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, as the successor to Arnold R. Jago, a named defendant in the courts below. The respondents are Kelly Chapman and Richard Jaworski, the named plaintiffs in the courts below for a class of all inmates at the Southern Ohio Correctional Facility.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (A-2).The decision of the United States District Court for the Southern District of Ohio, Western Division is reported as *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977). (A - 4).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered June 6, 1980. Jurisdiction is conferred by 28 U.S. C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ot Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case was initiated in the United States District Court for the Southern District of Ohio, Western Division on July 10, 1975 by the filing of a complaint pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3) arising out of conditions at Ohio's maximum security prison, the Southern Ohio Correctional Facility (SOCF). The complaint alleged that numerous facets of institutional life, connected with the practice of double celling inmates, amounted to cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. Specifically, the complaint alleged:

(1) violence and terror to an impermissible degree resulted from the practice of placing two inmates in the same cell;

(2) the number of guards and employees providing services to the inmate population is inadequate to serve the population, and the shortage of personnel has fostered violence and a lawless atmosphere;

(3) the inmates are not properly fed because food services are overtaxed;

(4) Overcrowding has limited access to the courts;

(5) heating and ventilation systems are not adequate;

(6) medical services are overtaxed; and

(7) inmate job opportunities and access to educational programs have been denied, thereby affecting the rehabilitation process. (A-8-A-9).

On April 1, 1976, the case was allowed to proceed as a class action. Thereafter, by order of March 23, 1977, the district court set the case for trial on respondents' second amended complaint on the sole issue of whether overcrowding at SOCF was unconstitutional.

The trial began on May 23, 1977 and concluded on May 27, 1977. On June 29, 1977, the district court issued its opinion declaring that double celling at SOCF was unconstitutional. (A - 4). The district court found that "on balance" the practice of placing two men in cells measuring variously 63 and 68 square feet was improper.

At the time of the trial, SOCF's population was approximately 2300 inmates and the institution contained 1620 cells. To solve that problem, approximately 1400 inmates were double celled with differentiation according to classification as to how much time was permitted outside the cells. Those inmates classified general population who were double celled were required to be in their cells between 9:30 p.m. and 6:30 a.m. (A-15-A-16). Idle classifications were permitted outside their cells between two and six hours per week. Reception inmates, approximately a two week process, were treated similiarly to the idle classification (A - 18).

The district court found SOCF to be a modern first rate institution, built in 1973 and possessing physical facilities able to accomodate the increased population. Food services, ventilation, lighting, plumbing, sanitation, law library and classroom facilities, medical services, visiting privileges and guard to inmate ratio were all adequate. The issue of clothing was not raised. The district court did find that there had been a watering down of jobs to make more jobs available, that some inmates had had educational opportunities delayed, though none had been denied an education, and that the number of psychologists and social workers had not increased with

the increase in population. Any inadequacy in dental services was not due to double celling. More importantly, the alleged increase in violence, described by respondents as a geometric increase due to double celling, was found to be non-existent. Any increase in violent incidents was due to increase in population and not double celling. (A-9, A-12, A-20 thru A-26, A-29, A-34).

Pursuant to the above findings, petitioners were directed to formulate a plan to eliminate double celling at SOCF. A petition for leave to file an interlocutory appeal was granted by the district court and denied by the Sixth Circuit Court of Appeals. A motion to stay execution of judgment was denied by the district court on September 20, 1977.

On February 16, 1978, the case was assigned for an evidentiary hearing on the plans proposed by defendants, plaintiffs' objections thereto, and plaintiffs' request for an incremental reduction order. The case progressed to hearing on March 7, 1978, at which time defendants orally, and in open court, asked for a reconsideration of the court's earlier conclusions of law.

By a memorandum of March 21, 1978, followed by the judgment entered on April 7, 1978, the district court adopted its prior findings of fact and ordered the defendants to reduce the population at SOCF from the assigned population of March 21, 1978 by twenty - five persons every thirty days until single celling was accomplished. (A - 42).

A notice of appeal was filed on May 1, 1978. On July 20, 1978, a motion for stay of execution of judgment and expedited hearing was denied by the appellate court. Following this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), the district court on August 14, 1979 denied petitioner's motion for relief from judgment and stay of execution of judgment. Thereafter, on November 8, 1979, the appellate court, by 2 - 1 vote, denied a motion for advancement of hearing, summary reversal,

and stay of execution. Following briefing and oral argument on June 2, 1980, the appellate court, on June 6, 1980, issued its decision affirming the district court. (A - 2). This petition has followed.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflict With Decisions Of This Court.

The present case involves an important issue of constitutional law not specificially and previously answered by this Court - whether the double celling of convicted maximum security inmates constitutes cruel and unusual punishment where such practice does not deprive such inmates of the basic necessities of life. In resolving that double celling at SOCF is cruel and unusual punishment, the district court has held that such practice is per se unconstitutional. This is contrary to the holding of this Court in *Bell v. Wolfish*, 441 U.S. 520 (1979), where Mr. Justice Rehnquist, speaking for the majority, stated at 542:

> We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the due process clause of the Fifth Amendment.

To be sure, this Court's decision in *Bell* related to the status of pre-trial detainees. It is incongruous however that conditions which this Court did not find to be "punishment" for presumably innocent defendants blossoms into cruel and unusual punishment where convicted maximum security prisoners are involved.

Petitioners interpret this Court's statement in *Bell* that confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time might raise serious due process questions to mean that an affirmative showing of deprivation of constitutionality mandated rights must be made. No such

finding was made in this case. While concededly the district court found some limitations occasioned by an increase in population:

> *** an institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety. *Wolfish v. Levi*, 573 F 2d 118, 125 (2d Cir. 1978).

See also: *Newman v. Alabama*, 559 F. 2d 283, 291 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

Citing *Kennedy v. Mendoza - Martinez*, 372 U.S. 144, 168-169 (1963), this Court in *Bell* stated the criteria necessary to establish that a practice is punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding... of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

None of these criteria are present in the instant case. Double bunking of prison inmates is established both historically and in other prison systems and the practice has its analogies in the military, schools, colleges, and in the home. Moreover, the practice of double celling at SOCF was instituted because of an increase in the number of people sentenced to prison and an increase in the number requiring confinement in a maximum security setting. No inmate at SOCF was double celled as further punishment for his crime or as punishment for violation of an institutional rule. No expressed intent to punish was alleged by the respondents, nor was it alleged that the decision to double cell was arbitrary or purposeless. Ohio prison administrators were simply charged with the custody of more than 1620 maximum security prisoners and had no other adequate facilities in which to house them. That such a practice may be less than ideal in no way converts such practice into cruel and unusual punishment.

The respondents, of course, alleged a "totality of evils" emanating from the practice of double celling. The district court rejected such a broad based attack. SOCF is a modern prison, opened in 1973; a building having more than twenty acres under roof containing a 25,000 volumn library. The institution also contains a modern school, two chapels, two dining halls, two large gynasiums, a large well equipped industrial area, a large recreation yard, an outside visiting area with a children's playground, and well equipped medical facilities. The institution is light and airy; the food is good; the ventilation system, plumbing and lighting are completely adequate. The guard staff is adequate. More importantly, while an increase in tension may have resulted from the practice of double celling, it has not been manifested by a per capita increase in violence, and any

violence was found to be well within normal limits for such a prison. (A - 33). SOCF is simply not the unsanitary dungeon frequently pictured in prison litigation.

In reaching its decision, the district court focused on current standards promulgated by professional organizations respecting the desired size of prison cells and institutions. (A - 36). This Court in *Bell*, however, held that constitutional rights are not coextensive with or determined by such constantly changing, increasing and somewhat utopian standards. *Bell, supra*, at 543, n. 27. Prison administrators are limited by the reality of budgetary contraints and already existing physical facilities. *Bell* simply indicates that the Constitution forbids the deprivation of the basic necessities of life. While the district court found a watering down of jobs, a delay in education and less than desirable access to psychologists and social workers, such "rights" are not of the dimension basic to sustain life. In reaching its decision, the appellate court misapplied *Bell* and failed to heed the admonition that prison administration is best left to prison administrators. Certiorari should be granted on this basis alone.

B. Conflicts With Other Circuits.

The decisions of the courts below are in direct conflict with all other circuits which have addressed the issue. At least four other circuits have found double celling of convicted prison inmates to be constitutionally permissible. *Newman v. Alabama, supra; Wolfish v. Levi, supra; Detainees of Brooklyn H. of Det. for Men v. Malcolm*, 520 F. 2d 392 (2nd Cir. 1975); *Crowe v. Leeke*, 540 F 2d 740 (4th Cir. 1976); *Hite v. Leeke*, 564 F. 2d 670 (4th Cir. 1977); *Burks v. Walsh*, 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd sub nom., Burks v. Teasdale*,

603 F. 2d 59 (8th Cir. 1979). The practice itself is not so barbarous as to shock the conscience of civilized society. *Hutto v. Finney*, 437 U.S. 678 (1978).

In all of the above decisions, the courts have taken the position, advanced by petitioners, that the right to relief turns not on the practice of double celling itself but whether such practice is part of a larger problem of unsanitary conditions, violence, or lack of food, clothing, shelter and medical care that are the basic necessities of life. Contrary to the decision of the district court, full employment, prompt education, and complete social service programs have not been found to be among such "rights."

The correct test has been stated in *Hite v. Leeke, supra*, at 574 - 575:

> So far as convicted prisoners are concerned, we have recently held specifically that the assignment of three prison inmates to a cell about the size of those with which we are concerned did not amount to "cruel and unusual punishment." *Crowe v. Leeke* (4th Cir, 1976), 540 F. 2d 740. The Court in that case emphasized that there was no contention there, just as there is not here, that the prisoners had been "subjected to mental abuse or corporal punishment; * * * deprived of the basic implements of personal hygiene; * * * [or] that his cell failed to meet reasonable sanitary standards." The petitioner's complaint - similar to that here - was simply that the assignment of three prisoners, confined

> in maximum security, to a cell was per se unconstitutional. Finding that there was no indication "that the overcrowding has resulted from an 'arbitrary or capricious' exercise of judgment by prison officals," the number of inmates, who may be safely assigned to a cell is a matter resting within the sound discretion of the prison administration, and the claim of cruel and unusual punishment was dismissed. Similarly in this case, it is clear that the defendants have not acted arbitrarily or capriciously in their assignments of inmates nor have they, in their dual assignments, been "the cause of deplorable or inhumane conditions."

As the district court's decision contravenes this test, certiorari should issue to resolve such question.

C. Importance Of The Issue.

In the last decade, prison litigation has flourished with a variety of conflicting decisions as to what is necessary to provide prisoners with minimum constitutional standards. In an era of increasing numbers of persons being committed to prison systems with limited resources, the area of greatest importance is the ability of such systems to be able to house such numbers. A clear statement from this Court is necessary to define the parameter of when or if prison officials may double cell in order to meet their burden.

In a real sense, the present case provides the proper vehicle for resolution of this issue. The State of Ohio has nine prisons housing 13,300 inmates in facilities

originally designed for 11,400. The only maximum security institution is SOCF. In addition to the population ceiling placed on SOCF, two other Ohio prisons are subject to federal court ordered ceilings. The result reached has had a wide ranging impact resulting in chaos for Ohio's system of classifying prisoners, a system originally found excellent by the district court. (A - 15). In addition, the case foreshadows the national dilemma of prison administrators faced with federal court ordered limitations on the number of prisoners the penal system may accept and their duties to accept prisoners committed by state courts. As this ruling effects a modern insititution such as SOCF, no other case will better offer an opportunity to define the issue. Certiorari should thus be granted to decide this issue of national importance.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition For Writ Of Certiorari have been served on respondents, Kelly Chapman, # 122-531, P.O. Box 45699, Lucasville, Ohio 45699 and Richard Jaworski, # 734304, River Junction Correctional Institution, P.O. box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Jean P. Kamp, American Civil Liberites Union, Suite 204, 203 East Broad Street, Columbus, Ohio, 43215, Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio, 44113, and Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210, by United States mail, postpaid, this _____ day of _____, 1980. I further certify that all parties required to be served have been so served.

_____

ALLEN P. ADLER
Assistant Attorney General

APPENDIX

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NO. 78 - 3365

FILED
June 6, 1980
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELLY CHAPMAN, et al.

Plaintiffs - Appellees

v.

JAMES A. RHODES, et al.

Defendants - Appellants

ORDER

BEFORE: LIVELY and MARTIN, Circuit Judges; PECK, Senior Circuit Judge.

This is an appeal from a judgment of the district court finding certain conditions at a state prison to violate the Eighth Amendment prohibition against cruel and unusual punishment. *See Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977). On appeal the State argues that the district court failed to render its decision on the basis of the totality of conditions at the prison and that instead the district court held "double celling" to be unconstitutional *per se*. The district court listed in its opinion a number of considerations upon which it based its finding that double celling at the particular prison in question is unconstitutional. We do not read the opinion as holding that double celling is unconstitutional under all circumstances. In response to a motion for relief from judgment which the State filed primarily in reliance on the decision of the Supreme Court of the United States in *Bell v. Wolfish*, 441 U.S. 520 (1979),

21 CL
2403

which appeared after the initial findings were made by the district court in the present case, the district court found no conflict with the decision of the Supreme Court and included a quotation from *Bell* which pointed out the differences between the prison at Lucasville, Ohio and the facility under scrutiny in *Bell v. Wolfish.*

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel the court concludes that the findings of fact of the district court are not clearly erroneous, that its conclusions of law are permissible from the findings of fact and that the remedial provisions are a reasonable response to the violations which were found.

Accordingly, the judgment of the district court is affirmed,

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A - 4

FILED
June 29, 1977

Kelly CHAPMAN, # 122531, Lucasville, Ohio, and Richard Jaworski, # 140 - 021, Lucasville, Ohio, Plaintiffs,

v.

James A. RHODES, Governor, George F. Denton, Director of Rehabilitation and Corrections, and A. R. Jago, Warden, SOCF, Lucasville, Defendants.

No. C - 1 - 75 - 251.

21 C.L 2403 (7)

United States District Court, S.D. Ohio, W.D.

Prisoners at state prison brought civil rights suit challenging constitutionality of "double celling" whereby two prisoners were housed in one cell. The District Court, Hogan, Chief Judge, held that: (1) practice of placing two prisoners in one cell at state prison was unconstitutional where prisoners were long term, "double celling" had resulted in prison exceeding its designed capacity by some 38%, cells were designed for one person and had square footage of approximately 63 square feet, double celled prisoners spent most of their time in cell with cell mate, and double celling was not a temporary measure but represented a trend which had continued for four years; but (2) only remedy immediately available was for court to declare double celling federally unconstitutional and order state to proceed with reasonable dispatch to formulate, propose and carry out some plan which would terminate double celling.

Ordered accordingly.

1. Witnesses 18

In civil rights suit challenging constitutionality of prison conditions, only seven of 35 requested writs of habeas corpus ad testificandum were granted at government expense in light of availability of substantial number of ex - prisoners and former prison employees who were subject to subpoena to testify as to conditions. 42 U.S.C.A. § 1983.

2. Criminal Law 1213

Confinement within a given institution may amount to cruel and unusual punishment where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of a reasonably civilized people. U.S.C.A. Const. Amend. 8.

3. Constitutional Law 272

Under the Fourteenth Amendment, a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law. U.S.C.A. Const. Amend. 14.

4. Prisons 13

Convicted maximum security inmates do not have constitutional right to privacy or private living quarters.

5. Prisons 17

Prisoners have constitutional right to basic medical and dental care.

6. Prisons 17

Practice of placing two prisoners in one cell at state prison was unconstitutional where prisoners were long term, "double celling" had resulted in prison exceeding its designed capacity by some 38%, cells were designed for one person and had square footage of approximately 63 square feet, double celled prisoners spent most of their time in cell with cell mate, and double celling was not a

temporary measure but represented a trend which had continued for four years. U.S.C.A. Const. Amends. 8, 14.

7. Prisons 17

Only immediate relief which federal district court could provide with respect to unconstitutional "double celling" of prisoners in state prison was to declare such practice federally unconstitutional; court would not immediately order state to "single cell" or release prisoners but would require state to proceed with reasonable dispatch to formulate, propose and carry out a plan which would terminate double celling.

Christopher D. Stanley, Cleveland, Ohio, Robert P. App, American Civil Liberties Union of Ohio, R. Raymond Twohig, Jr., Louis A. Jacobs, Ohio State U. College of Law, Howard J. Rosenberg, Bruce Friedman, Jan C. Leventer, and Edward Clark Barrows, Columbus, Ohio, for plaintiffs.

Allen P. Adler, Leo J. Conway. Asst. Attys. Gen., Columbus, Ohio, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HOGAN, Chief Judge.

Introductory

The basic question in this case is whether or not the prisoners at the Southern Ohio Correctional Facility for Ohio state prisoners at Lucasville, Ohio, are presently being subjected to "cruel and unusual punishment" or are being "deprived of life or liberty without due process of law" by reason of the "double celling" — and its concomitants — which is now and has been for some time in effect at that institution.

The claim was made in this case, filed under 42 U.S.C. § 1983. by two inmates who had then recently been double celled. The federal rights claimed denied are those assured under the eighth and fourteenth amendments and this Court has basic jurisdiction under 28 U.S.C. §§ 1331 and 1343 (3). The action was first filed as a purported class action by the two inmates *pro se* and *in forma pauperis*. Certification as a class action was originally denied on the ground that the asserted representatives were not qualified to represent the claimed class. Thereafter, competent counsel entered appearances on behalf of the plaintiffs and thereupon the case was certified as a class action.

[1] The plaintiffs have proceeded from the start of this case through the evidentiary hearing *in forma pauperis*. Shortly before the trial a request was made for approximately 35 writs of habeas corpus ad testificandum and, in addition, plaintiffs moved for two writs of habeas corpus ad prosequendum. Seven of the writs were granted. The applications for the remainder were denied. It was and remains the opinion of this Court (a) that a substantial number of individuals resident of this District (including former inmates released since the practice of double celling began, former employees no longer in the employ of any of the Divisions of the State of Ohio — both of the professional and non - professional type) existed and were within the compulsion of subpoena; (b) that the plaintiffs were free to subpoena any such; and (c) because of that available pool, the availability of seven inmates for testimonial purposes was sufficient under all of the circumstances. No limitation was placed on the plaintiffs and every subpoena requested by the plaintiffs was issued without the prepayment of costs and at the eventual expense of the United States, and, in fact, a number of witnesses from the pool were subpoenaed and did testify at the trial of this case.

The five inmates who were produced at the trial pursuant to the writs of habeas corpus ad testificandum did in fact each testify. The two inmates who were present throughout the entire trial pursuant to the writs of habeas corpus ad prosequendum sat at counsel table and aided counsel throughout the trial of this case, which consumed a week. Neither of them was put on the stand, which fairly well indicates that the writs granted were sufficient. The plaintiffs' class, throughout the entire controversy in this Court, has been fully and adequately and capably represented by counsel and the class, as such, was given adequate membership representation of its own selection.

While the plaintiffs come close to it, [1] they do not claim that double celling is per se unconstitutional. The assertion is that under all the circumstances of this case the practice is per accidens unconstitutional. The circumstances asserted to cumulatively bring about that result are as follows:

a) That violence and terror, to an impermissible degree, result from such.

b) That the guard and staff level has not been increased, is inadequate to serve the present population and that the inadequacy has fostered lawlessness and violence.

c) The feeding facilities are overtaxed to the point that the prison population is not properly fed.

d) The overcrowding has unduly burdened access to the courts.

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[1] The plaintiffs do assert that double celling in an approimately 65 sq. ft. cell for the day - by - day times described herein is "per se" unconstitutional.

e) The heating and ventilation systems have been overtaxed to the point of rendering cell blocks intolerable.

f) Available medical services are overtaxed.

g) Job opportunites have not kept pace with the population, reducing the rehabilitation process and the same is true of the school and schooling facilities.

These findings and conclusions will be directed to those areas as the relevant ones, since the State has put at issue each of the claims.

FINDINGS OF FACT

I. The Facility

The Southern Ohio Correctional Facility is located near the Village of Lucasville, Ohio. The immediate area is rural. It is approximately 100 miles east of Cincinnati and approximately 10 miles north of Portsmouth, Ohio. It is Ohio's only maximum security penitentiary. It was built in the early 1970's at a cost of some $32 million. It was designed to replace the ancient Ohio Penitentiary in Columbus. It is on a huge acreage tract. The structures themselves, i. e., the facility proper, occupies more than 20 acres and is under "one" contiguous roof. Looking at it from a brick and mortar viewpoint, it is unquestionably a top - flight, first - class facility. It has been in use only a relatively few years.

One of the controversial issues in this case is the question of how many prisoners it was designed to house. "Designed to house" is a rather nebulous term in this field. Nationally, during the five or six years before Lucasville opened, the prison population in the United

States had dropped some eleven plus percent. Nationally, in the four years or so since it has opened, the trend has been reversed and the prison population has gone up almost forty percent. There is no controversy with this: As built, the facility contained some 1,660 cells, and for our present purposes, each cell was designed to and did contain one bed. It was therefore the contemplation of officialdom that the facility would, during its useful life, not be called on to house more that 1,600 or 1,700 people and that would be in single cells.

The institution is probably best described as three prisons, K block, L block, and J block, which share common support facilities. K block and L block are virtually identical and each consists of a long, spinelike corridor with eight cell blocks off the corridor, a gymnasium at one end of the corridor, and access to the rest of the facility at the other end of the corridor. The cell blocks are numbered consecutively K - 1 through K - 8 and L -1 through L - 8 and each cell block has two upper and two lower cell ranges with twenty cells to a range. Some of the cell blocks have inner cell ranges in which the outer wall of the cell block is not used as a wall of the cells in the range. The rest of the cell blocks have outer cell ranges in which the outer wall of the cell block does constitute a wall of the cells in the range. In such cell blocks, each cell has a window that can be opened or closed by the occupants of the cell. A guard's console with controls for automatically closing and opening all the cells or any combination of them is located just inside the door from the corridor to the cell block. At the end of each cell range closest to the guard console is located a shower stall.

K block and L block corridors intersect each other at a 90 $^{\circ}$ angle. A third corridor near this intersection leads to J block, a smaller and more secure version of K and L blocks. J block corridor only has four cell blocks

off of it (J - 1 through J - 4) and at the end of the corridor is a visiting room rather than a gymnasium. J block is used to house inmates on death row (who are single celled) and inmates who have been placed in long - term administrative isolation for various serious disciplinary violations (some of whom are double celled). Each of the four cell blocks has four cell ranges as described above.

Located near the intersection of J, K and L blocks are the library and the school facilities. The library is a modern, well - lit room, stocked with some 25,000 volumes. Included is a law library.[2] Nearly every expert witness who testified in this case found the library to be superior in quality and quantity. The school facilities are located above the library and at the time of trial consisted of eight classrooms which were being remodeled to add additional classroom and office space.

A corridor from the intersection of J, K, and L blocks leads to the rest of the facilities. Along this corridor are located two chapels for holding religious services, the commissary, a barber shop, the dining rooms and kitchen and workshops. The workshops contain the prison laundry, a machine shop, a shoe factory, a sheet metal shop, print shop, sign shop, and small engine repair shop.

Finally, another corridor leads to the entrance of the institution. Located off this corridor are the administrative offices and staff dining room, a large visiting room, the medical and dental facilities, including a hospital ward with twenty single isolation cells and two ten-bed wards and the so-called merit block (D-2) where inmates who have achieved honor status are housed. The merit block has eighty cells and is presently single celled.

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[2] The plaintiffs do *not* claim that the law library is objectively inadequate. It *is* quite adequate. The plaintiffs' claims rest on "unavailability."

This complex is surrounded by two twelve - foot high, barbed wire topped, chain link fences and eight guard towers. Also, inside the fence are an outdoor recreation field, outdoor visitation area, and tomato garden. On the outside of the fence is a patrol road and also located outside the fence is a power plant and warehouse for the institution.

Shortly before the trial of this case, the plaintiffs moved that the Judge who presided at this trial "view the premises." That motion was granted and, in the company of a law clerk and with practically no notice, the facility was toured for approximately four hours just a few days before trial. The time expended was ample, since we are no stranger to Lucasville by reason of prior inspections and one "on the spot" civil rights case hearing. One of the difficulties of a "view" in a bench trial is the extent to which the view of necessity becomes evidentiary. Under that heading — the facility is new and that, of course, is a plus; as such places go, it is not lacking in color and most such places surely are; generally speaking, it is quite light and quite airy, etc.

II. The Inmates

At the time of trial, SOCF contained some 2,300 inmates. Sixty - seven percent of the inmates were serving either life or first degree felony sentences.

SOCF began receiving inmates in late 1972. Many of the inmates were transferred to SOCF from the Ohio Penitentiary. The closing of the Ohio Penitentiary [3] and the transfer of its inmates to SOCF did not take place overnight. The inmate population figures for SOCF have, therefore, exhibited an increase from the very first year

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[3] The Ohio Penitentiary continues to operate today as the Correctional Medical and Reception Center (CMRC), a central medical facility for all Ohio prisons.

of its operation. In more recent years however, the number of commitments by Ohio courts had greatly increased and the inmate population figures at SOCF (as do those of the entire Ohio system) reflect that increase. Sometime in 1975, the administration began double celling inmates at SOCF. The inmate population figures since 1975 are as follows:

January, 1975	1,320
January, 1976	1,954
January, 1977	2,202
Trial Date (May 23, 1977)	2,313

III. The Cells

Counting the medical ward, merit block and J, K, and L blocks, SOCF has 1,660 cells. The medical ward (D - 1) accounts for forty of these cells with two, ten - bed dormitories and twenty outside cells.

The remaining 1,620 cells are either inside or outside cells. There are 660 inside cells and they are located as follows:

Merit Block (D - 2)	80
J - 1 through J - 4	260
K - 1 through K - 4	320

Inside cells measure 6' x 10'6" x 9' high, are windowless, and consist of three solid walls with the fourth wall barred and serving as an entrance.

At the time of trial, all the cells in K - 2 and K - 3, most of the cells in K - 4, and some of the cells in J - 4 were doubled.

Cell blocks D-2 (merit) -80, K-1 (protective custody-max)-80, J-1 (Super max)-65, J-2 (disciplinary isolation) -65, and J-3 (death row)-60 are single celled. There are, therefore, about 350 cells in "undoubled" blocks.

There are 960 outside cells and they are located in K - 5 through K - 8 and L - 1 through L - 8. Outside cells measure 6' 6" x 10' 6" x 9' high and are otherwise similar to inside cells, except that they each have a window which can be opened or closed by the occupants. Nearly all of these cells are doubled.

All cells, with the exception of those in the medical ward, contain the following furniture and equipment: one cabinet - type night stand, one wall cabinet, one wall shelf, one wall mounted lavatory with hot and cold running water and steel mirror, one china commode which is flushed from inside the cell, one wall mounted, built-in radio, one heating and air circulation vent located near the ceiling, one twenty - six inch lighting fixture and one bed, 36 inches by 80 inches. In those cells which are doubled, a second bed has been added, bunk style, to the wall above the original.

There are at least three methods of "rooming" prisoners that have been referred to in the testimony in this case. One is the dormitory method, involving a number of beds, etc, in one large room. At the other end of the pendulum is one prisoner per cell of adequate size. The third method is doubling up in the cells. The dormitory method is the most objectionable. The preferable or ideal is one prisoner per cell.

Each cell block at the facility contains as a "built-in" adjunct a day room. By "built-in" we mean the placement is such that one may go from any of the ranges to the day room without leaving the block; or stated otherwise, passage from a cell to the day room does not involve opening the block door, nor does it involve walking into the corridor. The day rooms are in a sense part of the cells and they are designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den. Day rooms provide a place where a prisoner may go to get out of the confines of his cell and interact with different people, etc. These day rooms vary in size. Each day room contains

a wall mounted television, four or five card tables, and a varying number of chairs ranging from thirty to sixty. Inmates who are celled in K - 5 through K - 8 and L - 1 through L - 8, who are not at meals, recreation, the library, jobs, school, the visitors rooms, or showers, and, except between the hours of 9:30 p.m. and 6:30 a.m., may divide their time between their cells and these day rooms. During the daytime hours there is a ten minute day room break every hour on the hour in which the day room and the cells in the block are unlocked and inmates may return to their cells from the day room or vice versa during that period.

The plaintiffs have claimed in this case that the double celling and the increase in population has rendered the day rooms functionally useless. The assertion rests on a number of subsidiary assertions, such as, in the same breath, that now they are used by 80 to 120 people at a time, whereas, they used to be occupied by about 40 at a time, and "some inmates do not use the day rooms due to the overcrowding." At the worst, the day room availability has decreased 50%, but even that is speculative. The most this Court could find as a fact based on the evidence in the case is that there are infrequent occasions during which the day rooms are not as available as they would be if single celling were the 100% rule. That reduction is not significant in any respect.

IV. Inmate Classification

An inmate's classification determines where he will be housed at SOCF. The regulations governing the initial classification and reclassification of inmates were admitted as exhibits in this case and have been reviewed by this Court. According to the regulations, a Reception Center Classification Committee (and later an Institution Classification Committee) attempts to determine the needs and requirements of an inmate by considering

such information as staff reports, presentence investigations and educational and vocational testing reports and then assigns the inmate to appropriate custody, work or training programs.

Upon arrival at SOCF, all new inmates are housed in K - 5, which is also known as the Receiving Block, pending classification by the Institution Classification Committee. This process usually takes a couple of weeks. Inmates from K - 5 do not eat in the dining room at the same time as other inmates and generally do not mingle with general inmate population.

After being classified, an inmate is assigned to another cell block. Cell blocks K - 6 through K - 8 are presently used to house inmates who have trade or vocational assignments. Cell blocks L - 1 through L - 8 house, for the most part, inmates who are attending school or have jobs. Cell block K - 3, and part of K - 4, house inmates who choose to be "voluntarily idle." Cell block K - 2 is designated "limited activity" and houses those inmates who have requested protective custody, but other than that request have not substantiated a need for protective custody. Cell block K - 1 houses inmates in full protective custody. Cell blocks J - 1, 2, and 4 house inmates in administrative isolation for disciplinary reasons. Cell block J - 3 and a few cells in J - 2 constitute death row. Cell block D - 2 is the merit block where inmates who have attained honor status are housed.

As a direct result of this classification system, the cell block in which an inmate is celled establishes, in large part, the amount of time in which an inmate must be locked in his cell with a cellmate. For example, inmates celled in cell blocks K - 6 through K - 8 and L - 1 through L - 8 have to be locked in their cell with their cellmate only from around 9 p.m. to 6:30 a.m. During the rest of the day, these inmates could be eating meals in the dining room, at recreation (three times per week), at the library (four times per week), at their particular job or school, in the visitors room, the shower, or in the day

room.

Inmates celling in K - 3, K - 4, and K - 5 because of their idle or receiving classification do not have as much opportunity to be out of their cells as those inmates in K - 6 through K - 8 and L - 1 through L - 8.

Furthermore, all the inmates in K - 3 and K - 4, as well as K - 6 through K - 8 and L - 1 through L - 8, are permitted one weekly visit to the commissary, can attend the weekly movie shown in the gymnasium, and can attend religious services in the chapel.

Inmates celled in protective custody (K - 1) and limited activity (K - 2) have recreation in their respective day room and are permitted to shower. With those exceptions or unless escorted by a guard (such as to the visitors room), inmates in K - 1 and K - 2 spend all of their time locked in their cells. As noted, K - 1 is single celled and no one is placed in K - 1 or K - 2 who does not request it.

Similarly, inmates housed in the four J blocks spend nearly all their time locked in their cells.

At the risk of complicating, but in an effort to simplify — since permissible "out of cell time" is of such import in a double celling case — the evidence in this case establishes (out of 1,620 cells — the 40 hospital cells being excluded):

I. A total of 340 are single celled, including D - 2, 80; K - 1, 80; J - 1, 20; J - 2, 80 and J - 3, 80. Leaving a total remaining involved of 1,280 cells.

II. The occupants of 960 of those cells, K - 6, 80; K - 7, 80; K - 8, 80; L - 1, 80; L - 2, 80; K - 3, 80; L - 4, 80; L - 5, 80; L - 6, 80; L - 7, 80; L - 8, 80; D - 2, 80; are on school, or work,or merit status and are out of their cells (or at least have that option) some ten hours a day.

III. The occupants of the remainder (320 cells) are "out of cells" variably as follows:

K - 2 Limited Activity (semi - protective)	6 hrs. weekly
K - 3 Idle	4 hrs. weekly
K - 4 Administrative Isolation	2 hrs. weekly
K - 5 Receiving	4 hrs. weekly

(K - 5 are also "out of cells for meals" and the "tour" in K - 5 is a brief one, about 2 weeks.)

Inmates in K - 2 and K - 3 are there by "choice" (at least to some degree). Inmates in K - 4 are there as a result of claimed rule infractions and following a plenary hearing.

V. Inmate Lifestyle

As the aforementioned indicates, about 75% of the inmates of SOCF who are double celled have the choice of spending a considerable amount of their time outside of their cells. We turn now to examine the effect that double celling has on other aspects of the inmates' lifestyle.

— Food —

The plaintiffs have claimed that double celling has overcrowded SOCF and resulted in the inmates' present quantity and quality of being "grossly inadequate." To prove this allegation the plaintiffs presented three lines of evidence: Some inmate testimony that food portions have decreased since double celling began,

a New York prison expert who testified that the lowest amount he ever knew spent for food for inmates in New York was $1.70 each per day, and the food budget for SOCF for 1975, 1976 and for the first part of 1977 (pex. 26). These figures show that $680,718.00 was expended for food in 1975, $1,140,429.00 in 1976, but only $233,370.00 for the first calendar quarter of 1977.

The defendants presented testimony that the food was more than adequate in quantity and quality and that much attention was paid to making certain that it was served hot. The testimony established that the discrepancy in the budget figures was due to a new "portion control" program instituted in all Ohio prisons. Furthermore, the defendants pointed out that not reflected in the budget figures was food supplied by other Ohio prisons, such as milk from the London Correctional Institution's dairy farm.

None of the inmates who testified or appeared during the trial of this case appeared in any way undernourished or malnourished. The guards, as well as the administrative personnel, eat certain of their meals at the prison in a small cafeteria. The prepared food in that cafeteria comes from the same kitchen which serves the prisoners' dining rooms. Generally speaking, what will be served to the inmates as an evening meal is served to the guards and administrative personnel as a noon meal. No inordinate amount of food is garbaged. The portions are adequate. The kitchens and the dining rooms are clean. There is evidence that in one month, April of 1976, some 174 mice were caught in the area of the kitchen and dining rooms. That is an isolated instance and, under the evidence in this case, does not establish that the condition was present with any degree of permanence. The evidence is more consistent with a temporary rodent problem.

We do not mean to imply that the meals are the equivalent of home - cooked ones in any sense, but on the

other hand, we certainly find them to be adequate in every respect and there is no indication whatsoever that prisoners have been underfed or that food facilities have been taxed by the prison population.

— Air —

The plaintiffs have also claimed that double celling has made the cell blocks "humid and stuffy with stale air" and noise levels "intolerable." Every cell has a heating and air circulation vent and many have windows. The plaintiffs' own expert testified that he noticed no odors and that the cell blocks were "too quiet." (While the outside temperature exceeded 90° during this Court's inspection, the temperature inside the corridors and cells remained quite comfortable. No excessive noise was noted.) It is found that the institution is not unusually stuffy or humid. The ventilation system is adequate. Offensive odors are not present to any significant degree.

— Visitation —

SOCF is one of the few maximum security prisons in the entire country which permits contact visitation for all inmates. The plaintiffs' claim that the visitation facilities have been "overwhelmed" because of double celling was not proven at trial, i.e., no evidence was produced to substantiate it.

— Lawless Atmosphere —

Another of the inmates' claims was that double celling has resulted in overcrowding that has produced a "lawless atmosphere" at SOCF that the guards can not control. The statistics produced to establish an increase in violence have been almost worthless to this Court because of several differences in record keeping. This

Court does find that the plaintiffs have established that violent incidents have increased as the inmate population has increased. The plaintiffs have not established that violent incidents have increased out of proportion to the increase in inmate population.

The testimony concerning the amount of guards needed at SOCF was quite conflicting. Two guards testified for the plaintiffs that more guards were needed. One of defendants' experts testified that SOCF had too many guards.

This Court accepts the testimony of plaintiffs' expert from New York, Adam McGuillan, that a good "acceptable" inmate to guard ratio is seven to one. The inmate to guard ratio at SOCF is presently 6.13 to one, well within the acceptable ratio.

— Plumbing, Lighting, Law Library —

No evidence was presented which would demonstrate that the plumbing, lighting, or law library facilities are inadequate to meet the needs of the increased population.

As has been noted before, the plaintiffs' complaint with respect to the law library is not that it is inadequately equipped or booked. The claim is that access is denied. There was no evidence produced at all with respect to denial of access to the general population. The claim really boils down to access being denied to inmates in protective or disciplinary status. However, as applied to such inmates, law books are brought to the blocks involved on the request of inmates. There is no evidence at all that any of such requests were unreasonably denied. That entire situation would obviously exist whether the cells were double occupied or single occupied.

— Rehabilitation — Jobs —

The plaintiffs further claim that overcrowding due to double celling has reduced an inmate's opportunity to rehabilitate himself by lessening his chances of receiving educational or vocational training or a meaningful job. The statistics provided to this Court in plaintiffs' exhibits 24 and 25 are as follows:

	Inmates Working	Inmates School Full - Time	Inmates Idle
January, 1975	698	197	201
January, 1976	855	345	464
January, 1977	1,154	430	281
May 2, 1977	1,150	426	360

These figures do not include inmates in administrative isolation, death row, protective custody, merit status, or absent with leave (a total of 355 inmates as of May 2, 1977).

The plaintiffs argue that the increase in the number of inmates listed as working is not due to an increase in the amount of jobs as much as it is due to a "watering down" of the jobs that exist by assigning more inmates to each job than are necessary to complete the job. Thus, one inmate testified that he only actually worked twenty minutes per day to complete his job. Other inmates, such as food service workers, work closer to five or six hours each day. In any event, this Court finds that the testimony that there are not enough jobs to go

around is credible, [4] as is the testimony to the effect that many inmates assigned to jobs work only an hour or so a day.

— Schools —

There is no complaint about the classrooms or the equipment or library facilities insofar as schools are concerned. The classrooms are light, airy, and well equipped. Nor is there any complaint that access to schooling has been denied. About one out of six inmates opts to go to school and that was the percentage at the time of single celling, and still is. Classroom attendance involves approximately 10 hours a week and inmates in school have access to the library. There is no evidence that any inmate, ready, able, and willing to receive schooling has been denied the opportunity. There is evidence and it is found that the opportunity has been substantially delayed since double celling. Double celling has obviously interfered with studying since studying is left for the cells and day room.

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[4] Inmates who work receive twenty dollars a month. Of this twenty dollars, eight dollars is placed in a fund to be given to the inmate upon his release from incarceration. The remaining twelve dollars may be used by the inmate at the commissary. Inmates who do not work and are indigent receive personal hygiene items (razors, soap, toothbrushes, etc.) at the expense of the state. Indigent inmates also receive free postage and paper for one letter per week as well as free postage for all court related mail.

— Medical, Dental and Psychological —

At least one registered nurse and several nurses are on duty full time. A prisoner seeking medical assistance obtains a sick call pass from the nurses. Sick call is held every day for the general population. It is held only once a week in the so - called "up - tight" blocks (isolation, disciplinary, idle, protective custody). That means that except for emergency situations, a prisoner in an up - tight block has an opportunity only once a week to see a nurse who comes around to that block. The decision whether an inmate will be seen by a doctor is made by a nurse and following the request of a guard and that is true both in the uptight and general population blocks. The facility has an arrangement with one physician who is a qualified one and has considerable education, training and experience in both the general practitioner and surgical field. Sick calls are held by him at the facility at regular intervals at least twice a week, and the same doctor who lives and offices near the institution is available for emergencies at all times. There is a hospital close by at Portsmouth, Ohio which has been used for emergency purposes and many serious cases are referred to the Correctional Medical and Reception Center at the old Ohio Penitentiary at Columbus, Ohio. There is no credible evidence in this case based on which one could conclude that the authorities were indifferent to the medical needs of the inmates. Each week the doctor does see a substantial number of prospective patients and also those receiving ongoing treatment, and he does issue such prescriptions and orders and directions as he considers medically necessary. Those prescriptions are daily provided for from an adequate pharmacy. There is no substantial evidence that the directions are not followed as a general rule.

There is evidence in the case of a denial of what inmates consider to be appropriate medical treatment and there is evidence of isolated instances of failure to provide medical attention on request of a guard. The Medical staff has not been increased since the days of single celling. The situation does, of course, leave much to be desired, but cannot be described as out of hand or the result of indifference.

With respect to dental — there was a full - time dentist in the employ of the institution from April of 1976 to April of 1977. The dentist who occupied that position left and since has been replaced. Both at the time he came on and within a month after he left, a substantial waiting list and backlog of dental needs built up. There are several dental paratechnicians recruited and trained from the dental staff. When the then new dentist came on in April of 1976, there were approximately 100 people waiting to see him and in mid-May of this year, the backlog before the arrival of the new dentist was as follows:

> There were approximately 170 people waiting to get dentures of one kind or another;
> Approximately 140 people waiting to have teeth pulled and several hundred awaiting cleaning and cavity attention.

These temporary situations are, of course, intolerable. On the other hand, the evidence indicates that one dentist with the para - assistant is able ordinarily to cope with the needs of the population to the extent that those needs could be described as pressing. That is not to say that a single dentist can do anything but deal with immediate problems. He cannot. For instance, there is no time at all to formulate treatment plans for patients and carry them out. Again, there is no evidence that the authorities are indifferent to the needs.

Included in the staff at the facility are a psychologist and a social worker. The staff has not been increased since the double celling. The services rendered in that area have been substantially denied to a number of inmates due to the double celling.

VI. Violence

The evidence in this case relating to double celling and violence is divided into three categories: (1) Expert, (2) Guard and inmate, and (3) State prison management and its records.

— Expert —

The experts were all in agreement - as is everybody - that single celling is desirable. Double celling involves, of course, loss of privacy and close contact with another person involving an increase in tensions and frustrations. That is accented (1) by the fact that the inmate has little, if anything, to say on the choice of a cellmate, and (2) by the fact that a substantial number of the inmates are victims of some form of emotional or mental disorder. One expert testified that in a maximum security prison of any size some 15% of the inmates may be expected to be schizophrenic and that that type is particularly prone to violence engendered by "close quarters" and "frustrations". The prison psychologist and chaplain both testified that double celling had led to increasing tension, both proportionate and geometric, and agressive and antisocial characteristics.

— Guards and Inmates —

Introductorily, the credibility of the inmates and the two guards who testified for the plaintiffs is unusually difficult of assessment. The plaintiffs' main factual wit-

nesses consisted of the five inmates and one guard, Johnson. According to Johnson, the conditions with respect to double celling are intolerable. He testified that two men cannot move at the same time in a double cell (that is not so); that in one month he had four stabbings, two fights and a rape in a day room since double celling and none before; that nearly all the prisoners carry weapons to protect themselves; that in his cell block there were two fights a week between cellmates and two rapes a month vs. scarcely any stabbings or rapes before and alot less fights; that extortions and body sales were rampant now generally and scarcely occurred at all during single celling; that most of the violence occurred between cellmates; that one guard in a "general population" block could maintain order if the block were single celled but that with double celling it is "impossible" to do so; that a guard can establish "rapport" in a single celled block but not in a double celled one; that the day rooms are now overcrowded and it is impossible to maintain order., etc. Johnson came under the heading of "protesting too much." He has been suspended several times and at the time of trial was the subject of some disciplinary proceeding. He failed to report most, if not all, of the incidents of violence he testified to - giving as the reason they were not to be reported until verified or confirmed with the names of the participants and citing the difficulties in getting one inmate to name another. Based largely on his demeanor on the stand this Court does not regard Johnson as a credible witness.

The difficulty in assessing the credibility of the inmates' testimony is pointed up by this Footnote 3 to the Plaintiffs' request for findings:

> 3/ The refusal of inmates to "snitch" on the witness stand and name victims and predators they observed is understandable. "Snitching" is the act of reporting criminal behavior to the administration. The testi-

> mony shows that if it becomes known that an "inmate snitched" his life was not worth a plug nickel ***

Thus, while the inmates testified at length to violence, increase in violence, extortions, rapes and body sales and to the necessity of a substantial number of new inmates seeking protective custody or placing themselves under the protection of a "man" — all, when asked on cross - exam, declined to name names, etc. For reasons best known to themselves the defendants did not seek a Court order to answer. The point is that the inmate testimony was conclusory and general and not of much help from a credibility point of view.

We have no doubt that to a certain degree the criminal activity described by the prisoners does exist to a certain extent at Lucasville and, for that matter, in all prisons. The mere classification of a prison as "high security" implies that the overwhelming percentage of its inmates are there because of the commission of crimes involving violence directly (such as homicides) or courting it (such as burglary or larceny) and the fact of the matter is, as the recidivism rates show, that the inmate is likely to repeat. The problem posed by this case is simply whether double celling, as such, accounts for it.

—Prison Management and Its Records—

It has now been about two years since double celling has been in practice, to some and an ever-increasing extent, at Lucasville. The prison physician, who has been there throughout most of that time and would be called on to administer to any inmate seriously affected by violence, testified that there has been no increase other than what one would expect from increased numbers. He was joined in that testimony by the Superintendent and other prison authority. More importantly, the Regulations of the Department of Corrections of Ohio require the written reporting of any acts of violence. Such reports have been

made and are in evidence as plaintiff's exhibits 28, 29 and 30. These records are in detail and bespeak credibility.

On a percentage of incident rate (obtained by dividing the population number into the number of incidents) and on a quarterly basis, there is no substantial difference between occurrances during single celling and double celling. Thus, the "Stabbings" during the first and second quarters of 1975 (single celling) were respectively .22% and .40%; during the last quarter of 1976 and the first quarter of 1977 (double celling) the figures were .33 and .27. For "Fights" the comparable figures were 1.05 and .47 vs. .66 and .87. For "alleged — self inflicted" the comparable figures were .22 and .0 vs. .28 and .04.

We accept these figures and conclusorily find that there has been no increase in violence or criminal activity increase due to double celling; there has been due to increased population.

CONCLUSIONS OF LAW

1. "Traditionally, federal courts have adopted a broad hands - off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison officals are responsible for maintaining internal order and dicipline . . . and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the com-

mitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

"But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison . . . practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, at 404, 405, 94 S. Ct. 1800, at 1807, 40 L. Ed. 2d 224 (1973).

2. The "cruel and unusual punishment" clause of the Eighth Amendment is "progressive and is not fastened to the obselete but may acquire meaning as public opinion becomes enlightened by humane justice." *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 553, 54 L. Ed. 793 (1910).

[2] 3. Confinement itself within a given institution may amount to a cruel and unusual punishment where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of a reasonably civilized people. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), aff'd 442 F. 2d 304 (8th Cir. 1971).

[3] 4 Under the Fourteenth Amendment, "a prisoner retains all the rights of an ordinary citizen except those expressly, or by neccessary implication, taken from him by law." *Coffin v. Reichard*, 143 F. 2d 443,

445 (6th Cir. 1944).

5. The courts have a duty to protect prisoners from unlawful and onerous treatment of a nature that, by itself, adds punitive measure to those legally meted out by the court. (From *Sands v. Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973), vacated on other grounds 491 F. 2d 417 (5th Cir. 1974).)

6. The foregoing principles are well and authoritatively established and in line with them various federal courts, in the last seven or eight years, have critically examined the custodial institutions of many states and cities in an effort to ascertain and, if necessary, protect inmates from unconstitutional treatment while incarcerated. The question is constantly stated as one of ascertaining the "totality of the circumstances" of the particular case and then inquiring into whether the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience. Since the "totality " of the circumstances differ from case to case, it is difficult to find "controlling" authority.

7. For example, one of the first circumstances involved in the inquiry is whether the inmates involved are convicts or detainees. The Second Circuit, in a double celling case, *Brooklyn v. Malcolm*, 520 F. 2d 392 (1975) emphasized at the outset that —

> Here we are concerned only with the confinement of pretrial detainees and not convicted inmates.

Malcolm was a "due process" rather than "Eighth Amendment" case. However, there does not seem to be any difference between the two in the sense that the limitations imposed by both seem, under the decisions,

fairly much the same.

8. Many prior prison condition cases involving double celling or overcrowding did not involve maximum security convicted felons but rather county or city jails housing pretrial detainees or misdeameanants. *Brooklyn v. Malcolm, supra; Ambrose v. Malcolm,* 414 F. Supp. 485 (S.D.N.Y. 1976); *Rhem v. Malcolm,* 377 F. Supp. 995 (S.D.N.Y.), *aff'd,* 507 F. 2d 333 (2d Cir. 1974); *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 518 F. 2d 1241 (1st Cir. 1975); *Jones v. Wittenberg,* 323 F. Supp. 93 (N. D. Ohio 1971), *aff'd sub. nom. Jones v. Metzger,* 456 F. 2d 854 (6th Cir. 1972). *See also, Rodriguez v. Jimenez,* 409 F. Supp. 582 (D.P.R.), *aff'd* 537 F. 2d 1 (1st Cir. 1976). Other cases involved jail structures which were antiquated and in which the plumbing, lighting, heating, ventilation, sanitation, and noise levels bear no resemblance to SOCF at all. *Rodriguez v. Jimenez, supra,* (jail built in 1808); *Inmates of Suffolk County Jail v. Eisenstadt, supra,* (jail built in 1848); *Jones v. Wittenberg, supra,* (jail built in 1895); *Hamilton v. Schiro,* 338 F. Supp. 1016 (E. D. La. 1970) and *Hamilton v. Landrieu,* 351 F. Supp.549 (E. D. La. 1972) (prison built in 1929). *See also, Pugh v. Locke,* 406 F. Supp. 318 (M. D. Ala. 1976); *Holt v. Sarver, supra.* Still other cases involved dormitory or barracks housing for inmates. *Gates v. Collier,* 423 F. Supp. 732 (N.D. Miss. 1976); *Holt v. Sarver, supra.* The failure to provide basic medical treatment to inmates is a condition found in other cases which is not present in this case. *Rodreguez v. Jimenez, supra; Pugh v. Locke, supra; Costello v. Wainwright,* 397 F. Supp. 20 (M.D.Fla. 1975), *aff'd,* 525 F. 2d 1239 (5th Cir. 1976); *Jones v. Wittenberg, supra,* and 73 F.R.D. 82 (N.D.Ohio 1976); *Hamilton v. Schiro, supra.*

9. On the question of inmate violence, Courts have

recognized that probably no prison is a "safe" place to live [5] and that incidents of violence, including homosexual attacks, are going to occur in the best run prisons. *See, e.g., Finney v. Hutto*, 410 F. Supp. 251 at 263 (E.D. Ark. 1976). It is simply impossible to stamp out crime and violence in a place where one is the most apt to expect it — a maximum security prison. For one reason the authorities are simply unable in most incidents to ascertain the identity of the agressors. This fact of life does not, of course, excuse prison officials from using ordinary care for the safety of inmates from violence from other inmates. The defendants have not failed to use ordinary care for inmate safety. A sufficient number of guards has been provided. Homosexuality, enforced and consensual, extortion and criminal activity have increased with double celling, but only proportionally and not geometrically.

[4] 10. With respect to inmate privacy, this Court is aware of no authority holding that convicted maximum security inmates have a constitutional right to privacy or private living quarters — nor have we been cited to any.

[5] 11. Medical and Dental. The Supreme Court has recently reaffirmed: "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration . . . ' it is but just that the public be required to care for the prisoner, who cannot, by reason of a deprivation of lib-

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[5] One witness testified that in the same period of time during which two inmates were killed at SOCF, 164 inmates and 16 staff members were killed at another state's maximum security prison of comparable size to SOCF.

erty, care for himself.' " *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 290. 50 L.Ed. 2d 251 (1976). The state may not be indifferent to but must provide basic care. And that, of course, is true of dental care. The record does establish that the inmates' State has provided an adequate medical staff consisting of a physician and several nurses; that the doctor holds at least semi - weekly sick calls; that he is subject to and does respond to emergency calls; that patients have been treated, hospitalized at the location, and on occasion as required taken to local or Columbus hospitals. The constitutional requirements of basic medical care and concern for the inmates have been met.

That cannot be said of the dental care situation. There have been two occasions during which the defendants have failed to provide adequate dental care and each of them has occurred when the state - provided dentist resigned and there existed a vacancy pending obtaining a successor. At the present time a competent dentist is adequately serving the facility and whatever relevancy the previous deficiency had to "double celling" has passed.

[6] 12. It is our conclusion overly and on balance that the double celling at Lucasville is unconstitutional. The conclusion is based on these reasons.

A

The inmates are "long term." That can only accent the problems of close confinement and overcrowding.

B

The rated capacity of the installation is 1,600. It was designed to hold that number. Overly, it is now holding some 38% more people than the designers and builders intended it to. One method the Courts have used rather consistently to gauge overcrowding has been to compare the actual population with the rated capacity. Overcrowding necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure. Remedial decrees have issued limiting to "design capacity." *See Miller v. Carson*, 401 F. Supp. 835 (M.D. Fla. 1975); *Ambrose v. Malcolm*, 414 F. Supp. 485 (S.D.N.Y. 1976). In the latter case, the Court said:

> " . . . it is manifest that the defendants may not house detainees in the dormitories of (the prison) in numbers significantly in excess of its rated capacity. Certainly this is true where, as here, the defendants have presented no evidence as to why the capacity set by the defendants themselves — or their predecessors — should not control, subject only to such variation as the record in this case may justify." (at 494)

"Rated capacity" or "design capacity" was directed by remedial decree in *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972). See also, to the same general effect: *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

C

The cells were designed, built and rated to house one man. The square footage in each is, for our purposes,

approximately 63 square feet — meaning that double celling reduces the square footage of living quarters per man to something in the neighborhood of 30 - 35 feet at best.

One court has said flatly, " . . . 50 square feet of living space is the minimal acceptable requirement to comport with the Constitution." *Gates v. Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976). That conclusion is supported by the testimony in this case and otherwise.

The American Correctional Institution has concluded that 75 square feet is the minimally acceptable standard.

The National Sheriffs Assn. Handbook on Jail Architecture (1975) asserts that single occupancy detention rooms should average 70 - 80 square feet (at pg. 62).

The National Sheriffs Assn. Manual on Jail Administration (1970) suggests that in multiple celling 55 square feet of space per occupant is mimimal.

The National Council on Crime and Delinquency Model Act for the Protection of Rights of Prisoners (1972) concludes that "not less than fifty square feet of floor space in any confined sleeping area" should be provided as the minimal.

The Report of the Special Civilian Committee for the study of the United States Army Confinement System (1970) indicates that the Army standard in 1969 was 55 square feet and the Army, not known for "coddling," adheres to that.

All of the above conclusions deal with "sleeping space" and contemplate additional space for other purposes, such as day rooms. All are relatively contemporary. All indicate the "contemporary" standard. *Weems. See also, Pugh v. Locke, supra,* requiring single occupancy isolation cells of 60 square feet; *Martinez v. Jimenez*, 409 F. Supp. 582 (D.P.R. 1976) "not less than 10 x 7."

In the *Gates v. Collier* case, *supra,* the Court observed with respect to the standard of 50 square feet of living (sleeping) space per man, "No one takes issue with the basic requirement for human decency and this Court

holds a failure to achieve that minimal standard contravenes the Eighth Amendant prohibiting cruel and unusual punishment."

D

At the best a prisoner who is double celled will spend most of his time in the cell with his cellmate. A substantial number must so spend all but six hours a week and another substantial number all but four hours a week.

E

The double celling involved here began almost two years ago and now involves some 1,400 people. In other words, this is not a situation in which the *present* need of and for single cells has just been brought about through a reversal in trends. As we have pointed out, the prison population in the United States declined steadily in the early to middle seventies and was relatively stable until 1972. Since then it has grown some 39 or 40% and 1976 was the largest single year on record. Constitutionality and unconstitutionality are relative or elastic terms and we certainly are not concluding that all double celling in any 60 square foot cell is beyond the ambit. The State need not contemplate a trend reversal. But the present trend has continued for four years — the double celling at Lucasville has done nothing but increase. It is in that background of relative permanence that the conclusions herein are reached. Double celling in 60 - foot cells is undoubtedly permissible as a temporary measure, but we deal not with anything temporary here.

REMEDY

[7] At this time and on this present record, this

Court is not in any position to do aught but conclude and declare that double celling at Lucasville is federally unconstitutional.

That conclusion (if it be eventually determined to be correct) may require the State to build additional facilities and to raise the funds necessary to do so. This Court certainly has no power to direct that on the present record and it is problematical whether a Court would ever be in a position to do so.

As the Court said in *Brooklyn v. Malcolm*, 520 F. 2d 392 (2nd Cir. 1975), "we, can, however, order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time."

The plaintiffs urge that the defendants should be ordered to "single cell" or "release" right now. We rather doubt that the State is, overnight, prepared to move any substantial number of inmates from Lucasville and "single cell" them elsewhere. A "single cell" or "release" order would be clear abuse of discretion on the present record. On the other hand, the State must proceed with reasonable dispatch to formulate, propose and carry out some plan which will terminate double celling at SOCF.

Within ninety (90) days from the filing hereof, the defendants may propose and file herein such a plan. A date for hearing thereon will be thereupon assigned. No order will issue at this time. Jurisdiction is retained.

A - 39

FILED
March 21, 1978

No. C - 1 - 75 - 251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

vs.

JAMES A. RHODES, et al.,

Defendants

MEMO

An evidentiary hearing has taken place in this case on the alternative plans to terminate double celling at Lucasville (as submitted by the defendants) and on the "incremental reduction" suggestion of the plaintiffs.

The defendants have proposed five alternate plans. Alternates numbered 4 and 5 are contingent upon further action by the Ohio Legislature and would require voter approval. At best, either plan would take something in the neighborhood of five years to put into effect and involve too much speculation to merit approval.

Alternative Plans 2 and 3 each would involve the installation of dormitories, one in cell blocks and the other in a gym and shop area. From the evidence at this hearing, as well as at the merit trial of this case, it is clear that "dormitory" facilities are even less desirable than double celling; in other words, those cures are worse than the ailment.

Alternate 1 proposes that double celling be authorized only for cell blocks containing prisoners having either a job or school assignment, or both. The inmates

involved in double celling would be permitted to remain outside these cells between the hours of 6:30 a.m. and 9:30 p.m. All other housing areas would be authorized single cells only. The trouble with this alternate is that it would (or could) lead to an inmate population of 2,500 some 200 more than when this case started. And, as we have seen, the greater the population, the less meaningful the job and school assignments. Alternate 1 has merit to the extent that it deals with the problem of "around the clock" double celling. In the end, however, it would simply add to the overtaxation of the facilities of the institution.

The plaintiffs suggest that this Court simply order the population reduction by the defendants of 100 men per month until the population is reduced to design capacity, by whatever means the defendants select.

When this case was tried, the population was approximately 2,300. It is now approximately 2,000. For working purposes, the design capacity is 1,700. So a reduction of 300 will accomplish the desired result (including, of course, the more meaningful job and school assignments and rehabilitation services).

The Ohio (pertinent) prison population is about 13,000. Lucasville is the only maximum security institution (the classification into which involves considerations of potential danger to society, escape likelihood, etc.). There are three medium security institutions in Ohio, at Marion, Chillicothe and London. Of its total inmate population, 1,400 entered Lucasville in the period 1975 - '76 - '77.

The plaintiffs suggest that the overall population (statewide) could be reduced by commutation, parole, etc. Neither this Court nor the defendants have any control of such matters - nor any business in it. The plaintiffs also suggest the increased use of half - way houses (for suitable inmates of the general population) with the "domino" affect it would have throughout; or the use of local jails. The latter are up to capacity -

or over - already. The former usage would depend on the parole authorities and for that and other reasons it is not feasible to get into that.

The State has not seriously contested the assertion that some of its other correctional institutions are not overpopulated or even full. The State does assert that it could not accomplish a wholesale transfer out of Lucasville of some three or four hundred inmates overnight, or even in a brief period of time. That assertion is reasonable - the State does not contest that a "mix" can reasonably be accomplished in a reasonable time.

Conclusorily - (1) we are satisfied from the evidence that a reduction in population can be reasonably accomplished, (2) that the choice of method (reducing admissions, accelerating transfers, etc.) should be left to the defendants, (3) that a reduction in inmate population of twenty - five (25) men per month beginning in April, 1978 and continuing until the population is reduced to approximately 1,700 overall is proper and the defendants should be ordered so to do.

The defendants have moved for a reconsideration of the June 29, 1977 Conclusions of this Court - based on *Hite v. Sessions*, 564 F. 2d 670 (4th Cir. 1977). There are some substantial differences in the facts involved and the motion to reconsider is therefore denied.

The parties are requested to prepare and submit a proposed judgment in accord with the Findings and Conclusions of June 29, 1977 and this memo. If the parties are not able to agree on a proposed judgment, each side may submit his own.

/s/ Timothy Hogan
United States District Judge

A - 42

FILED
April 7, 1978

NO. C - 1 - 75 - 251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

vs.

JAMES A. RHODES, et al.,

Defendants

JUDGMENT

This matter having come before the Court to determine the relief necessary to implement this Court's order of June 29, 1977, and the Court having considered the evidence presented at all hearings conducted in the case, the briefs and arguments of the parties, and its memoranda of June 29, 1977, and March 21, 1978, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. The Findings of Fact and Conclusions of Law of June 29, 1977 and the Memorandum decision of March 21, 1978 are adopted and incorporated herein as the Findings of this Court for purposes of this Order.

2. Defendants shall reduce the assigned population at the Southern Ohio Correctional Facility (S.O.C.F.) from the population on March 21, 1978 (approximately 1995) by twenty - five persons on or before April 30, 1978, and shall continue to reduce the population by twenty - five persons every thirty days thereafter until the population is reduced to the single - celled capacity of the institution.

3. Defendants shall use any constitutional means of their choice to accomplish the population reduction, including reducing admissions, accelerating transfers, etc., provided that the defendants shall not transfer members of the plaintiff class to other institutions in which they will be double - celled, or placed in dormitories (unless the transferees have been reclassified).

4. Defendants shall submit to the Court and to counsel for the plaintiffs, within ten days after the end of each thirty - day period, a statement showing the number of the assigned population at S.O.C.F. at the end of the period (In - house, Absent With Leave and Absent Without Leave).

5. Costs are awarded to plaintiffs.

6. Any issue involving attorney's fees is severed and will be passed on in due course on any application filed therefor. There is no just reason to delay the entry of this judgment as to the other issues and the entry hereof is directed.

/s/ Timothy Hogan
United States District Judge

NO. 80-332

FILED
DEC 22 19[illegible]

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES A. RHODES et al.,
PETITIONERS

vs.

KELLY CHAPMAN et al.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR
PETITIONERS

LOUIS A. JACOBS
COUNSEL OF RECORD
Ohio State University College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

JEAN P. KAMP
The Legal Aid Society of Columbus
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

COUNSEL FOR
RESPONDENTS

(Continued Inside Front Cover)

PETITION FOR CERTIORARI FILED
SEPTEMBER 2, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113
(216) 771-0811

ROBERT K. HANDELMAN
186 East Eleventh Avenue
Columbus, Ohio 43201
(614) 294-1636

COUNSEL FOR RESPONDENTS

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Filed June 6, 1980

(omitted)

Printed at A-2 of
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States District Court
Southern District of Ohio
Western Division
Filed June 29, 1977

(omitted)

Printed at A-4 of
Petition for Writ of Certiorari

MEMORANDUM

United States District Court
Southern District of Ohio
Western Division
Filed March 21, 1978

(omitted)

Printed at A-39 of
Petition for Writ of Certiorari

JUDGMENT

United States District Court
Southern District of Ohio
Western Division
Filed April 7, 1978

(omitted)

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Petition for Writ of Certiorari

J.A. 2

GEORGE S. VOINOVICH, INC.
A FULL SERVICE CORPORATION OF:
URBAN PLANNERS • CONSTRUCTION MANAGERS • DEVELOPERS

May 5, 1976

Commissioner George Denton
Director, Dept. of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, Ohio 43229

Reference: Inmate Capacity - Southern Ohio
Correctional Facility

Dear Commissioner Denton:

Enclosed are the Inmate Population figures that our Correctional Consultant, Robert D. Barnes, A.I.A., was telling you about during our visit to your office last Friday.

We are also enclosing an article from The Wall Street Journal on a new Federal Community Correctional Center. Of particular interest was the reference to the area per inmate, i.e., 200 Sq. Ft.

Hope this data helps you and that additional construction funds for Penal Institutions are soon available.

While two (2) men per cell may be permitted healthwise, it still is custodially undesirable I'm certain.

Very truly yours,

George S. Voinovich, Inc.

/s/ Paul V. Voinovich
Paul V. Voinovich, President

PVV:srb
Encl.

GEORGE S. VOINOVICH, INC.
A FULL SERVICE CORPORATION OF:
URBAN PLANNERS • CONSTRUCTION MANAGERS • DEVELOPERS

May 5, 1976

MEMORANDUM RE: Southern Ohio Correctional Facility

"Space Available for the Housing, Recreation, Education, and Service of Inmates"

Area in Square Feet

B-1, 2	Administration	55,125 Sq. Ft.
C-1, 2	Offices - Treatment and Custody	26,980 Sq. Ft.
C-3	Inmate Services	4,610 Sq. Ft.
D-1, 2	Hospital and Receiving	25,240 Sq. Ft.
E-1, 2, 3	Shop and Laundry	120,000 Sq. Ft.
F	Inmates - Dining Room & Kitchen	39,600 Sq. Ft.
G	Chapel	8,580 Sq. Ft.
H	Library and School	22,448 Sq. Ft.
I	Special Treatment Dining Room	4,580 Sq. Ft.
J-1 thru 4	Special Treatment Cells	63,200 Sq. Ft.
K-1 thru 4	Inside Cell Blocks	63,200 Sq. Ft.
K-5 thru 8	Outside Cell Blocks	63,200 Sq. Ft.
L-1 thru 8	Outside Cell Blocks	126,400 Sq. Ft.
M-1, 2	Gymnasiums	34,720 Sq. Ft.
N and O	Warehouse, Etc.	49,450 Sq. Ft.
P	Boiler House	12,600 Sq. Ft.
	Total	719,933 Sq. Ft.
	Say	720,000 Sq. Ft.

Housing - Capacity

Hospital(2 Dorms@10 ea.)(20 Outside Rooms)	40)	
Receiving (Inside Cells)	80)	120
Death Row (Inside Cells)	20)	
Special Detention (Inside Cells)	240)	260
Inside Cells	320)	
Outside Cells	960)	1,280
		1,660

Memo Re: Southern Ohio Correctional Facility
Cont'd. May 5, 1976

Area in Housing Area

Inside Cells are 6'-0" x 8'-0" x 9'-0" High = 432 Cu. Ft.

Outside Cells are 6'-6" x 12'-6" x 9'-0" High = 731 Cu. Ft.

* * * * * * * * *

Possible Capacity Figures

Outside Cells could be double decked which would still provide 365 cu. ft./inmate in sleeping quarters which is adequate.

This would increase capacity by	960 Inmates
Existing Housing Capacity	1,660 Inmates
New ~~Emergency~~ Housing	2,620 Inmates
or Excluding Hospital & Receiving	120 Inmates
Reasonable Emergency Capacity	2,500 Inmates*

*Area per Inmate - 288 Sq. Ft.

Robert D. Barne, A.I.A.
Correctional Consultant

NO. C-1-75-251

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,
Plaintiffs,

vs.

JAMES RHODES, Governor,

JAMES RHODES, Governor, et al.,
Defendants.

MEMORANDUM OPINION

Filed December 14, 1976

This is a prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. The action was orginally filed *pro se* by Kelly Chapman and Richard Jaworski, two inmates at the Southern Ohio Correctional Facility in Lucasville, Ohio, and alleged that the double celling of inmates at that institution violates the constitutional rights of all the inmates. Plaintiffs' motion to certify this action as a class action was denied by this Court on the ground that as neither Chapman nor Jaworski were licensed attorneys, the class would not be represented by competent counsel.

Subsequently, several attorneys filed an entry of appearance on behalf of the inmates and renewed the motion to certify the case as a class action. That motion was granted by the Court in a short Order on April 1, 1976. The defendants then moved for summary judgment, which motion was denied by this Court on July 29, 1976. Plaintiffs

moved to file an amended complaint by leave of Court. On July 29, 1976, that motion was granted in part and denied in part. The motion was granted insofar as it involved the original parties defendant in the original complaint and the allegations, causes and prayers pertinent to said original parties. The motion was denied insofar as the plaintiffs sought, by amendment, to add new parties defendant and allegations, causes and prayers against any such new parties. The plaintiffs were given 30 days within which to file an amended complaint consistent with the July 29 Order.

On August 30, 1976, plaintiffs did file their amended complaint. Thereafter, the defendants moved to dismiss the amended complaint on the grounds that the named plaintiffs were no longer representative of the certified class, that the amended complaint did not comply with this Court's July 29 Order, and on the grounds that the amended complaint failed to state a claim upon which relief can be granted. The action is now before this Court on the defendants' motion to dismiss. The defendants' motion to dismiss the entire action is denied. However, for the reasons that are set forth in this opinion, several of the causes of action presented in the amended complaint are dismissed.

CONVERSION OF RULE 12(b) (6) MOTION INTO A SUMMARY JUDGMENT MOTION

The plaintiffs, in their memorandum in opposition to the defendants' motion to dismiss argue that the motion to dismiss should be treated as a Rule 56 motion for summary judgment because several affidavits have been filed as exhibits in this case, both by the defendants and the plaintiffs. Plaintiffs then claim that there are several genuine issues of material fact remaining to be resolved in this action which preclude this Court from granting summary judgment in the defendants' favor.

Rule 12 of the Federal Rules of Civil Procedure provides in part that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Either party or both may bring this conversion provision into operation by submitting extraneous matters. *See, e.g., Evans v. McDonald Aircraft Corp.*, 395 F. 2d 359 (8th Cir. 1968). However, the Court has complete discretion to determine whether or not to accept any material offered in conjunction with the Rule 12(b) (6) motion, 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1366 at 678 (1969). In this action, as the record indicates, there has been almost no discovery completed. This Court believes that such discovery is necessary before the summary judgment procedure may be utilized effectively, if at all. Therefore, at this stage of the proceedings the affidavits submitted by both parties will be excluded and this Court will not convert the Rule 12(b) (6) motion into a Rule 56 motion.

STANDING

A. Chapman's and Jaworski's Standing to Challenge the Double Celling

The defendants, through their motion to dismiss, allege that neither plaintiff Chapman nor plaintiff Jaworski are presently double celled. While the defendants have submitted an affidavit to that effect, they have also requested this Court only to consider that affidavit as "background

information for the benefit of this Court." (Defendants' reply memorandum, doc. 45). In any event, this Court does not believe that even if Chapman's and Jaworski's claims have been mooted, this case has been removed from the realm of a "case" or "controversy." The Supreme Court has permitted class actions to go forward despite the representatives' technical lack of standing due to mootness where the issue is "capable of repetition, yet evading review." *See Roe v. Wade*, 410 U.S. 113, 125 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilvie*, 394 U.S. 312 (1969). Furthermore, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1952). *See also, Davis v. Caldwell*, 53 F.R.D. 373, 376 (N.D. Ga. 1971).

B. Chapman's and Jaworski's Standing to Represent the Inmates on Questions Other Than Double Celling.

The plaintiffs in their amended complaint have raised virtually the entire gamut of potential prisoner's complaints arising from confinement. They seek in this class action to challenge everything from the cleanliness of the trays in the dining room to the adequacy of the medical facilities.

It is axiomatic that if the named plaintiffs lack individual standing they may not bring an action on behalf of anyone; merely claiming to represent an injured class will not satisfy the requirement of individual standing. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973); *Accord, Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Berger, C.J., concurring).

After individual standing is determined, the parties seeking representative status must show that they are a member of the class sought to be represented, that the representatives' claims are typical of the proposed class, and the class will be fairly and adequately represented. Rule 23(a)

Federal Rules of Civil Procedure. The representatives must meet both the threshold constitutional standing requirements and Federal Rules of Civil Procedure 23(a) (3) and (4) standing requirements in order to insure that the class represented has a personal stake in the outcome of the case and to preserve procedural due process for the absent members of the class.

When this Court certified this action as a class action, it was on the ground that inmates Chapman and Jaworski were presently double celled, and were represented by competent counsel. There has never been any showing or determination by this Court that inmates Chapman and Jaworski were adequate representatives of the inmates of the Southern Ohio Correctional Facility in any regard other than whether double celling is a violation of the United States Constitution. Thus, this Court's certification of this action as a class action was only as to the issue of double celling. When the Court ruled on the plaintiffs' motion to amend their complaint, it specifically limited the plaintiffs to amending the allegations pertinent to the original complaint.

Therefore, insofar as the amended complaint raises new issues and asserts new allegations other than those dealing with the question of the constitutionality of double celling inmates at the Southern Ohio Correctional Facility, it is not in compliance with this Court's grant of leave. Plaintiffs fourth and eighth causes of action fail to comply with this Court's July 29 Order. They, therefore, should be and hereby are stricken.

FAILURE OF OTHER OF PLAINTIFFS' CAUSES OF ACTION TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' second cause of action is that the absence of personal privacy at the Southern Ohio Correctional Facility violates the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution.

This Court has been unable to find a single decision holding that convicted felons have a constitutional right to private living quarters. As the United States Supreme Court stated in *Alanza v. New York*, 370 U.S. 139, 143 (1962), "a jail shares none of the attributes of the privacy of a home, an office, an automobile or a hotel room."

Plaintiffs' fifth cause of action is that the defendants have failed to provide adequate protection to insure the health and safety and well being of members of the plaintiff class and those members are required to live under fear of constant attack and assault or in self-imposed isolation in violation of the fourteenth amendment. In essence, what plaintiffs are claiming is that they must either seek a transfer to a segregated unit or live in fear of attack from other inmates. Plaintiffs point out that such a transfer of necessity results in their losing certain privileges and advantages. However, since the plaintiffs admit that they have a right to request a transfer and even though such a transfer entails a vast reduction in privileges, their claim does not amount to a constitutional violation. *Breeden v. Jackson*, 457 F. 2d 578 (4th Cir. 1972); *Schyska v. Shifflet*, 364 F. Supp. 116 (N.D. Ill. 1973).

Plaintiffs' sixth cause of action is that the defendants, by selecting a limited number of individual inmates to participate in the work, vocational, educational and other opportunities and programs, have violated the equal protection clause of the fourteenth amendment of the United States Constitution.

The problem, of course, with plaintiffs' contention is that a prisoner has no constitutional right to work or be educated while in prison. *Cradle v. Superintendent*, 370 F. Supp. 79 (W.D. Va. 1974). The plaintiffs' contention, in essence, is that if a state undertakes to provide any rehabilitative services, it must provide such services to all inmates. However, as there are no constitutional duties imposed on any governmental entity to educate or rehabilitate a prisoner, this Court believes that efforts to rehabilitate and

educate are to be commended and that requiring every prisoner to be treated exactly alike might discourage rather than encourage such programs. *McLamore v. State*, 257 S.C. 413, 186 S.E. 2d 250 (1972). This Court believes that a constitutional issue is raised only if an inmate's work assignment is decided arbitrarily or capriciously. *Beatham v. Manson*, 367 F. Supp. 783 (D. Conn. 1973). Such an allegation is not present in this record.

Plaintiffs claim in their seventh and ninth causes of action that the defendants have failed to provide them with a reasonable opportunity for rehabilitation and that the present conditions at the Southern Ohio Correctional Facility are such as to increase the likelihood that they will not be rehabilitated or successfully integrated into society in violation of the cruel and unusual punishment provision of the eighth amendment and due process provision of the fourteenth amendment. While rehabilitation is certainly an important goal of an institution of confinement, this Court has been unable to find a single case holding that there is a general constitutional right to rehabilitation.

Plaintiffs' tenth cause of action alleges that the conditions at the Southern Ohio Correctional Facility constitute a punishment in addition to that ordered by the trial court responsible for the original incarceration of the plaintiffs and thereby violates the double jeopardy provision of the fifth and fourteenth amendments.

This Court has been unable to locate any authority supporting plaintiffs' legal theory. Furthermore, one of the most recent treatments of the double jeopardy clause by the United States Supreme Court indicates that the purpose of the double jeopardy clause is to prevent a citizen from experiencing the risk of multiple trials and convictions, not punishment. *Breed v. Jones*, 421 U.S. 519 (1975).

Plaintiffs' eleventh cause of action alleges that the defendants have defaulted on their responsibility under Ohio law to maintain the health and welfare of those placed in

their custody. Such a contention is an attempt by the plaintiffs to induce this Court to exercise pendent jurisdiction over what is clearly a state claim. While this Court may have the judicial power under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to exercise pendent jurisdiction under this cause, we expressly decline to do so on the ground that the state courts are more properly the institution to consider the plaintiffs' claims.

Plaintiffs' twelfth cause of action is that the conditions of the Southern Ohio Correctional Facility disproportionately affect black inmates and create conditions of involuntary servitude in violation of the thirteenth amendment of the United States Constitution. However, the thirteenth amendment expressly exempts punishment for a crime from its prohibitions:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

See, e.g., Sims v. Parke Davis and Co., 334 F. Supp. 774 (E.D. Mich. 1971).

In summation, plaintiffs' fourth[1] and eighth cause of action are stricken for failure to comply with this Court's Order of July 29. In addition, plaintiffs' second, fifth, sixth, seventh, ninth, tenth and twelfth causes of action are dismissed for failure to state a cause of action under Section

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[1]Inmate Chapman has previously raised the same issues contained in the plaintiffs' fourth cause of action by way of a civil rights action before this Court. In that action this Court held an extensive evidentiary hearing on the adequacy of the medical and dental care at the Southern Ohio Correctional Facility and denied preliminary relief on May 16, 1973. *Chapman v. Gilligan*, Civil No. 8700 (S.D. Ohio May 16, 1973 (Hogan, J.). Furthermore, inmate Jaworski has also attempted to raise the same issues in another civil rights action filed in this Court. That action was recently dismissed. *Jaworski v. Rhodes*, No. C-1-76-263 (S.D. Ohio August 25, 1976) (Porter, J.).

1983. This Court also refuses to exercise its discretion to consider the state claim raised in plaintiffs' eleventh cause of action.

Plaintiffs are hereby granted leave to file a second amended complaint consistent with this Opinion within ten days. Defendants shall have ten days within which to respond to said second amended complaint.

It has been this Court's desire that a trial on the merits of this action be held at an early date. In that regard, this Court previously set a deadline for the completion of discovery by August, 1976 and reset, at the parties request, that deadline to October, 1976. The confusion resulting from the filing of the amended complaint necessitated the vacating of the October deadline. This Court believes that the confusion is now eliminated. Accordingly, this matter is once again referred to the United States Magistrate for any and all discovery and pretrial purposes.

/s/ Timothy Hogan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-1-75-251
JUDGE HOGAN

KELLY CHAPMAN, *et al.*,

Plaintiffs,

vs.

JAMES A. RHODES, GOVERNOR, *et al.*,

Defendants.

SECOND AMENDED COMPLAINT
(CLASS ACTION)

Filed Dec. 27, 1976

I. PRELIMINARY STATEMENT

This is a class action filed by inmates at the Southern Ohio Correctional Facility (hereinafter SOCF), located at Lucasville, Ohio, arising out of the severe overcrowding and confinement of inmates under conditions which counter meaningful rehabilitation thereby constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and a denial of due process and equal protection in contravention of the Fourteenth Amendment to the United States Constitution. These conditions stem directly from the decision by defendants to increase the number of inmates confined at SOCF to a figure well above the design capacity of the institution and beyond the staff and institutional resources available to effectively respond to the needs of such a population. A substantial number of prisoners are compelled to live two per cell in cells originally designed for single occupancy.

The oppressiveness of this overcrowding is manifested by the scarcity of vocational, educational, job opportunities which allow inmates an opportunity to escape the idleness and tension of their congested cell and living area. It has produced a situation where a substantial percentage of the inmate population is reduced to a status of chronic idleness, without meaningful and relevant educational and rehabilitative opportunities, living in constant fear of assault and bodily injury. The atmosphere at the SOCF is regressive and counter-productive to commonly accepted standards of rehabilitation and civilized incarceration. To force inmates to endure such overcrowded conditions with the gross absence of opportunities for meaningful growth and rehabilitation is inhumane and dehumanizing; moreover, such conditions actually dehabilitate inmates. These conditions compel judicial intervention.

II. JURISDICTION

1. This cause of action arises under 42 U.S.C. §1983 and lies in this Court by virtue of 28 U.S.C. §1343(3). It is not subject to the requirement of a minimum amount in controversy.

2. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure, which relate to the declaratory judgment and injunctions.

3. Jurisdiction is invoked pursuant to 42 U.S.C. §1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States, and the Eighth and Fourteenth Amendments to the United States Constitution.

III. PARTIES

A. PLAINTIFFS

4. Kelly D. Chapman is incarcerated by reason of a conviction of armed robbery upon a judgment from the Court of Common Pleas of Hancock County, Ohio, and is being subjected, due to the overcrowding at SOCF, to conditions of confinement that are unconstitutional.

5. Richard Jaworski is presently incarcerated by reason of multiple drug convictions arising from the Court of Common Pleas, Cuyahoga County, Ohio, and is being subjected, due to the over-crowding at SOCF, to conditions of confinement that are unconstitutional.

B. CLASS ACTION ALLEGATIONS

6. This action is filed on behalf of named plaintiffs and, pursuant fo Rule 23(a), (b) (1) (2) of the Federal Rules of Civil Procedure, on behalf of all others similarly situated as inmates of the Southern Ohio Correctional Facility who are compelled to live in the overcrowded conditions.

The requirements of Rule 23 are met in that: the class is so numerous that a joinder of all members is impractical; there are questions of law common to the class; the representative parties will fairly and adequately protect the interest of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

C. DEFENDANTS

7. James A. Rhodes is Governor of the State of Ohio. As such, he is charged by Article III, Section 6 of the Constitution of 1851 "[to] see that the laws are faithfully

executed." His office is in the State Capitol, Columbus, Ohio.

8. George F. Denton is the Director of the Ohio Department of Rehabilitation and Correction. As such, he is entrusted by law to provide adequate care, custody and treatment to all prisoners incarcerated under his control. He is sued in his official capacity.

9. A. R. Jago is the Superintendent of the Southern Ohio Correctional Facility. As such, he is in direct control of custody of the plaintiff class, and he is charged with the responsibility for the health and welfare of the plaintiff class. He is sued in his official capacity.

IV. FACTS

10. Approximately fifty percent (50%) of the population at SOCF is compelled by defendants to live on a two-man basis in cells designed and adequate only for single occupancy.

11. A substantial proportion of plaintiff class has been confined to isolation and subjected to loss of privileges in order to protect themselves from the danger of physical and emotional exploitation and serious injury arising from overcrowding.

12. Plaintiffs Chapman and Jaworski were housed, at the time this action was commenced, in Section K-8 of the SOCF in cells which were originally designed for one man, but which presently hold two, and their situations are typical of fifty percent (50%) of the institution. The remaining population faces the imminent prospect of living under similar circumstances.

13. This doubling-up occurs in a cell designed and adequate for single occupancy. The dimensions of each cell are 10′ 6″ by 6′ 6″, with toilet, bunk, sink, bureau, and personal items which leave an area for movement of no more than twenty-five square feet. This overcrowding is so severe

that when one individual chooses to be on the floor of the cell, the other must, of necessity, remain in his bunk.

14. As a result of putting 160 men into an 80-man cellblock, the blocks are humid and stuffy with stale air day and night, and the extra heat deriving from the "body heat" in the overcrowded units makes time spent enclosed in the cell unbearable. Odors of sweaty and unwashed bodies and intolerable noise levels are a constant fact of existence.

15. Those inmates housed in cell block units which have been doubled-up suffer twenty-four hours per day without even one moment of privacy. Dayrooms, which are large rooms attached to each cell block area and which frequently provide the only practical means of recreation, are required to accommodate one hundred-sixty men, rather than the intended eighty. Dayrooms are frequently so overcrowded that the men barely have room to stand, and because the dayroom has no toilet facilities or drinking water, one must wait for an occasional break to urinate or get a drink of water.

16. The adverse consequences of overcrowding extends not only to those doubled celled, but also to the entire prison population.

17. The resources, programs, and services which were barely adequate when the institution housed fourteen hundred inmates have now become grossly inadequate due to the overcrowded conditions. Defendants have not provided a programmatic, vocational, recreational or organizational curriculum or adequate staff or resources necessary to meet the needs of the expanded population, resulting in serious fundamental deficiencies in the rehabilitative opportunities available to the inmates, their health and welfare and psychological well-being.

18. Medical, dental, psychiatric and social work resources have been severely overburdened by the needs of increased population, permitting the treatment of only acute problem disorders and illnesses which have managed to come to the

attention of the institution staff. Problems are permitted to deteriorate further, resulting in unnecessary hardship to the plaintiff class and often reach a point where their consequences are irreversible. No facilities exist to allow the appropriate screening and monitoring of inmates' health and emotional needs.

19. The present resources in the institution are totally unable as a result of the overcrowding to provide assistance to those who have educational, vocational, and counseling needs. Work assignments are extremely limited and, as a consequence, a substantial percentage of the inmate population finds itself living in forced idleness, where they must remain almost exclusively within the confines of their cells and cellblock areas.

20. The extraordinary overcrowding, combined with the lack of meaningful opportunities for work, educational and vocational assistance and the absence of social services, have actually lessened opportunities for successful rehabilitation and re-entry into society and served to dehabilitate inmates.

21. No rational basis exists for the arbitrary and capricious allocation among the prison population of the acutely scarce treatment and rehabilitation programs. Various classes of inmates have been developed and are defined by their access (or lack thereof) to the opportunities and resources offered by the institution.

22. Successful rehabilitation is frequently contingent upon a penal environment which offers opportunities for mature responsibility, educational accomplishment, relevant vocational training and the maintenance of the basic dignity of the individual. Overcrowding at SOCF, as manifest by the enforced idleness, minimal work and rehabilitative opportunities, and dehumanizing conditions, has produced an environment that contributes to, rather than combats, episodes of disruptive and antisocial behavior, and lessens the possibilities for successful release and reintegration into society. The overcrowding thus not only precludes

rehabilitation, but also serves to dehabilitate the prison population, and in fact increases significantly the likelihood that members of plaintiff class will commit criminal acts upon release.

23. The overcrowded conditions create increased hostility, tension, anger and violence within the institution, and the inability or unwillingness of the guard force to effectively provide reasonable protection to the inmate population has produced a situation in which many of the plaintiffs live in constant fear of acts of random violence, physical exploitation, serious injury and/or death. For these inmates, the only solution often is either to secure protection at the hands of stronger inmates or to accept self-imposed isolation. This lawless atmosphere within the institution produces a demoralizing situation, enhancing the suspicion and hostility of the inmates, and contributes to a situation of everincreasing violence and tension.

24. Members of plaintiff class are denied parole opportunities in an unreasonable and arbitrary fashion in that consequences directly arising from overcrowding are attributed to plaintiffs and adversely affect their parole opportunity.

25. Food and other vital resources have decreased proportionately per inmate with the increase of the population. The quantity and quality of food is presently grossly inadequate.

26. The law library facilities have not been expanded to meet the needs of the increased population; instead, the defendants employ procedures and policies that restrict inmate access to legal resources, causing members of plaintiff class to suffer delay in completing and filing papers essential to pending litigation.

27. Visitation facilities at SOCF have been overwhelmed by the increased number of individuals seeking to avail themselves of their use, depriving the plaintiff class of adequate contact with family and friends.

28. Defendants have inadequately trained guards to effectively cope with the increased number of inmates, particularly those inmates of a different race and background. This has led directly to a situation in which guards have used unwarranted force and intimidation against the plaintiff class in general and implemented discriminatory and racist procedures and policies against racial minorities.

V. FIRST CAUSE OF ACTION

29. Compelling members of the plaintiff class to live under the circumstances described in paragraphs 10 through 28, fully incorporated herein, creates a process of dehumanization and illustrates a contempt for their existence, which shocks the decency and conscience of a humane society and violates the prohibitions of cruel and unusual punishment contained in the Eighth and Fourteenth Amendments to the United States Constitution.

VI. SECOND CAUSE OF ACTION

30. The confinement of the members of the plaintiff class, under a regime of enforced overcrowding and idleness, to close quarters with no opportunities for privacy, the denial of reasonable opportunities for relief from conditions of overcrowding in their cellblocks, the provision of substandard and inadequate food, the inability to effectively check and deter the violence and lawlessness by inmates against inmates and the prolonged confinement under the circumstances described in paragraphs 10 through 28, fully incorporated herein, constitutes cruel and unusual punishment, is excessive and disproportionate punishment, and violates the Fourteenth Amendment of the United State Constitution.

VII. THIRD CAUSE OF ACTION

31. The manner in which defendants allocate treatment and rehabilitation opportunities and resources, as described in paragraphs 17-21 and 25-28, fully incorporated herein, violates the Fourteenth Amendment to the United States Constitution in two ways: first, the arbitrary and capricious assignment of inmates to those opportunities and resources denies equal protection to inmates not so assigned; and, second, the discretion used in assigning inmates is impermissibly tainted by consideration of the race of the inmate.

VIII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court:

1. Assume jurisdiction of the causes and set this case down promptly without unreasonable delay for hearing;

2. Enter a Final Judgment pursuant to Section 28 U.S.C. §§2202, 2201, and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that the overcrowded circumstances present at SOCF that have given rise to denial of necessary staff and resources and consequences as heretofore described violate the plaintiff class' rights under the Eighth and Fourteenth Amendments to the United States Constitution;

3. Order the defendants and their agents to promptly review the status of all those presently confined at the SOCF, with an aim at transferring to other institutions, releasing on work furlough or parole all those individuals presently confined, whose record and prison history prior to the overcrowding at SOCF indicate a successful reintegration into society or whose need for confinement in a maximum security institution is not demonstrable.

4. Further, order that defendants are precluded from considering as determinative in their reclassification or release decisions the fact that inmates have not demonstrated success under the overcrowded conditions with vocational training work assignments, educational advances, or other programs at SOCF or have incurred a disciplinary record as a result of conditions generated by the overcrowding of the institution.

5. Appoint a special master to insure that the State of Ohio and defendants use sufficient programmatic and financial resource and staff to ensure that each member of the plaintiff class is not confined under conditions that produce dehabilitation. The special master shall have the authority to periodically review the situation at SOCF to determine the extent to which the programs being operated by the institution are in conformity with constitutionally prescribed standards;

6. Enjoining defendants, their successors, employees or agents and all other persons from operating SOCF under overcrowded conditions and placing two men in a single cell (unless such confinement is for a short-term period only).

7. Retain jurisdiction over this suit for a period sufficient to gauge compliance with the orders of the Court and guarantee nonrepetition of defendant's conduct.

8. Grant such other and further relief as to this Court deems necessary and just.

Respectfully submitted,,

/s/ R. Raymond Twohig, Jr.
R. RAYMOND TWOHIG, JR.
Trial Attorney for Plaintiff
HANDELMAN & TWOHIG

/s/ Robert K. Handelman
ROBERT K. HANDELMAN
HANDELMAN & TWOHIG
186 East 11th Avenue
Columbus, Ohio 43201
(614) 294-1636

/s/ Louis A. Jacobs
LOUIS A. JACOBS
Supervising Attorney
Clinical Programs
College of Law
The Ohio State University
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821
All Counsel of Record
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Amended Complaint was mailed, first class postage prepaid, to defendants, through their counsel, Allen P. Adler, Assistant Attorney General, Criminal Activities Section, Office of the Attorney General, State Office Tower - 15th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 23rd day of December, 1976.

/s/ Louis A. Jacobs
LOUIS A. JACOBS

J.A. 26

Case No. C-1-75-251

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,
Plaintiffs,

vs.

JAMES A. RHODES, et al.,
Defendants.

ALTERNATIVE PLANS IN COMPLIANCE WITH THIS COURT'S ORDER OF JUNE 29, 1977
Filed Nov. 11, 1977

In compliance with this Court's order of June 29, 1977, defendants submit five alternative plans for ending double celling at the Southern Ohio Correctional Facility.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

/s/ Allen P. Adler
ALLEN P. ADLER
Assistant Attorney General
State Office Tower
Suite 1521
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ALTERNATIVE COMPLIANCE PLANS

The following alternative plans are submitted in compliance with the June 29, 1977 order of the United States District Court for the Southern District of Ohio in the case of *Chapman v. Rhodes,* Case No. C-1-75-251, to "...proceed with reasonable dispatch to formulate, propose and carry out some plan which will terminate double celling at SOCF."

The plans are rank ordered from most desirable to least desirable in relation to institution security, institution programming, cost, and feasibility and timing of implementation. Wherever an alternative requires funding approval from persons outside the Department of Rehabilitation and Correction, such is noted.

ALTERNATIVE #1

Examination of the recent trend in reduced rates of prison commitments from the criminal courts, and as has been projected this reduction can be anticipated as remaining stable, together with the fact that many inmates sentenced for first degree felonies will become eligible for parole for the first time, leads to the projection that the population of the Southern Ohio Correctional Facility (hereinafter SOCF) will stabilize and probably decline over the next four years.

In fiscal year 1974 (July 1, 1973 through June 30. 1974) the total number of commitments was 5,126 prisoners. In fiscal year 1975 the number rose to 7,219 and rose again in fiscal year 1976 to 7,352 prisoners. In fiscal year 1977 the number of commitments fell to 6,867 prisoners. Prior to 1974 the commitment rate was consistently under 5,000 prisoners annually. It is opined that the large increases were due to the revision in the entire Ohio criminal code which became effective on January 1, 1974, together with an increasing crime rate. Recently, however, the incremental effects of the code revision have abated and stabilized; and the crime rate

is dropping. Furthermore, prisoners given minimum sentences of five, six, or seven years in 1974 will become eligible for parole consideration in 1977 and 1978. A prisoner given a five-year minimum sentence becomes eligible for parole after serving three years and four months of that sentence. A prisoner given a six-year minimum sentence is eligible for parole in three years, nine months and eighteen days, and a prisoner given a seven-year minimum sentence is eligible after serving four years, five months, and six days. Since the SOCF population contains a high percentage of prisoners with such minimum sentences (approximately 40% of the SOCF population are first degree felons), it is reasonable to believe that parole rates will increase at the SOCF as the size of the eligible pool increases.

From the foregoing, it is the Department of Rehabilitation and Correction's belief that the Court's objectives can be achieved within a reasonable time without resort to radical and potentially hazardous restructuring of its programs. It is recognized, however, that certain classifications of prisoners at the SOCF are best suited for single-celled housing immediately.

With this in mind, the Department of Rehabilitation and Correction proposes as its first alternative that double celling would be authorized only for cell blocks containing prisoners having either a job or school assignment, or both. Cell blocks currently containing such inmates are designated L1 through L8, K6 through K8, and D2. (It is not anticipated that D2 cells would be double bunked, however.) These inmates are and will continue to be permitted to remain outside their cells between the hours of 6:30 a.m. and 9:30 p.m. daily. All other housing areas would be authorized single cells only, unless redesignated to house inmates in the above-described categories.

Barring substantial changes in the criminal law respecting sentencing or a sudden increase in the crime rate, this alternative should prove successful. The Department prefers

this alternative since it allows for optimal deployment of custody personnel and otherwise maximizes security. Additionally, this alternative facilitates rehabilitative programming, and can be implemented at low cost and with presently available funding.

ALTERNATIVE #2

All cells designated for single occupancy. To house the remaining inmates, up to forty beds would be placed, each in front of a ground level cell door, in eleven "outside cell" blocks. Viz., L1 through L8 and K6 through K8. In addition to beds, adequate shower, toilet, and storage facilities will be provided. Each inmate assigned to a bed will have 77 square feet of personal living space at full capacity. There will be four foot aisleways between the beds and the cell doors. The open housing area is approximately 3,080 square feet and 61,000 cubic feet in size. Presently this area is termed an exercise area. It is seldom used for such purpose, however, as ample and more desirable recreation areas are available for prisoners assigned to these cell blocks.

This arrangement will allow for similar deployment of security personnel as Alternative #1, but is thought to be somewhat less secure overall since open living areas would be exposed to a greater number of prisoners than cell areas. Additionally, there is some cost associated with this alternative for the provision of toilet, shower, and storage facilities not incurred under Alternative #1. Rehabilitative programming should remain at the level provided in Alternative #1. This alternative could be implemented within two months, following receipt of required equipment. It should be noted that this alternative fully meets the Court's mandate of fifty square feet of personal living space per prisoner. Further, the maximum population of a cell block would be reduced from 160 to 120 prisoners. This alternative can be accomplished within the existing budget for the Department.

ALTERNATIVE #3

All cells designated for single occupancy. To house the remaining inmates, the M-1 gymnasium (at the end of L Block), an industrial shop, and the print shop would be converted to dormitories. Each dormitory would be further divided into not greater than 50-man living units with appropriate separation maintained. Prisoners would sleep on beds with adequate toilet, shower, and storage facilities provided. Dayroom type facilities would also be established. Each prisoner assigned to such a dormitory would have in excess of 60 square feet of personal living space at full capacity of 600.

The print shop is approximately 10,492 square feet net in area; the M-1 gym is approximately 8,664 square feet net in area; the shoe shop is approximately 12,932 square feet net in area.

This alternative is viewed as less desirable than the previously discussed alternatives since approximately sixty additional security personnel would be required to supervise the dormitories. Additionally, certain structural modifications would be required in order to maintain adequate security in the dormitories. Rehabilitative programming will be reduced because of the shop closings and recreational opportunities will be curtailed because of the gymnasium closing. Adequate recreation, however, can be maintained through greater utilization of the M-2 gymnasium and outside recreation areas. The cost of implementing this alternative is anticipated to be greater than under the previous alternatives. This alternative could be implemented fully within six months following receipt of the necessary equipment and supplies. It should be noted that this alternative fully meets the Court's mandate of fifty square feet of personal living space per prisoner.

The facility modification required by this alternative can be accomplished within the existing budget for the

Department. Additional funding would be required to hire custody personnel.

ALTERNATIVE #4

Construct an additional block containing 640 cells. This alternative would allow each inmate at the Southern Ohio Correctional Facility to have a single cell upon completion of the new housing unit.

While desirable from a security standpoint, this alternative would require the hiring of approximately 100 additional custody personnel. The estimated cost of construction is $15,000,000. Funding could be provided through the passage of House Joint Resolution No. 15 which requires public approval. It is anticipated that were funding approved, the construction could be completed within two years. It is believed that current support facilities (air circulation, water supply, food service, etc.) are of sufficient capacity to maintain an additional cell block.

This alternative, as noted, requires action by persons outside this Department to execute and cannot, therefore, be assured. Security, rehabilitative programming, and essential services would remain adequate under this alternative.

ALTERNATIVE #5

Construction of new prisons with funding provided for in House Joint Resolution No. 15. That bill has been recommended for passage by the House Judiciary Committee but has not yet been voted upon by the full House. This bill provides for a $280,000,000. bond issue to be submitted to the voters. It is anticipated that this matter could not be placed on a State-wide ballot before June, 1978. Construction of the new facilities would require from two to four years. Since this alternative requires both legislative and public approval for funding, implementation cannot be

assured. The measure does, however, have the support of the Department of Rehabilitation and Correction.

All prisoners at the Southern Ohio Correctional Facility would likely be provided with single cells upon completion of the new prisons and transfer of certain prisoners.

J.A. 33

COMPLIANCE PLAN COSTS
CHAPMAN v. RHODES

1. No additional cost.		
2. Commodes: 5 per range -- 11 ranges @$65 ea.	$3,575	
Sinks: 5 per range -- 11 ranges @$45 ea.	2,475	
Plumbing Supplies & Materials -- 55 units @$45 ea.	2,475	
Floor Modifications @ $70 per range	550	
TOTAL MATERIALS		$9,075
2 Plumbers: 176 hrs. ea. @$8.10 + 14.3% fringe	3,259	
2 Maint. Workers: 176 hrs. ea. @$8.20 + 14.3% fringe	3,299	
1 Maint. Supv.: 176 Hrs. @$8.20 + 14.3% fringe	1,650	
TOTAL LABOR (at O.T. rate)		8,208
TOTAL MODIFICATION COST		$17,283
3. This alternative cannot be met due to the requirement of 60 additional security staff; costs as follows:		
50 CO II @$ 8,819 + 20.5% = $10,267	$531,350	
7 CO Supv. I @$ 9,506 + 20.5% = $11,455	80,185	
3 CO Supv. II @$11,544 + 20.5% = $13,911	41,733	
Holiday and other O.T. @ 7%	45,279	
TOTAL CUSTODY LABOR	698,547	
Uniforms and Equipment @ $140 each	8,400	
TOTAL ADDITIONAL STAFF COST		$706,947
Construction Costs, utuilizing the following areas - shoe shop, warehouse, and M-1 gym.		
38 Shower Units @ $100 each	$3,800	
56 Commode Units @ $100 each, complete	5,600	
56 Sinks @ $80	4,200	
Security Screen in Gym	5,000	
Fencing - Roof of OPI Building	6,480	
Exhaust Fans for OPI Building	4,000	
Security Locks and Additional Doors	2,000	
Lighting and Wiring for all areas	9,000	
TOTAL MATERIALS		40,080
Labor = 1848 hours (8 staff) @ $63.26 hr. plus fringes		19,120
Supplies = Lockers @ $40 x 440		17,600
TOTAL CONSTRUCTION COSTS - base		$116,880
TOTAL FIRST YEAR COSTS		$823,827

Loss of Income to OPI
Shoe Shop $198,589 x 110% = $218,447 per year

Note, Alt. No. 3:

M-1 Gym = 110 bed spaces (8,664 sq. ft. net ÷ 110 = 78.8 sq. ft.)	15,730 sq. ft.
Shoe Shop = 215 bed spaces (12,932 sq. ft. net ÷ 215 = 60.0 sq. ft.)	67,006 sq. ft.
Print Shop = 174 bed spaces (10,492 sq. ft. net ÷ 174 = 60.0 sq. ft.)	total OPI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Alternative Plans for Compliance With This Court's Order of June 29, 1977, was served on plaintiffs through their counsel, Robert B. App, American Civil Liberties Union of Ohio Project on the Rights of the Institutionalized, 203 East Broad Street, Columbus, Ohio, 43215, and Christopher D. Stanley, 535 Leader Building, East 6th and Superior, Cleveland, Ohio 44114, by regular U.S. mail this 11th day of November, 1977.

/s/ Allen P. Adler
ALLEN P. ADLER
Assistant Attorney General

NO. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

v.

JAMES A. RHODES, et al.,

Defendants

ORDER

Filed May 8, 1978

—A—

A Judgment was entered in this case on April 7, 1978. Defendants filed a motion to reconsider on April 13, 1978. To the extent, if any, that this Court presently has jurisdiction of that motion (a Notice of Appeal having been filed on May 1, 1978) - the motion to reconsider is denied. The motion is in reality a reassertion of the defendants' Alternate Plan I and the rejection of that Plan (see Memo of March 21, 1978) is repeated.

—B—

On May 1, 1978 defendants moved for a stay of execution pending appeal. The record does not support the claim that a reduction of 25 inmates a month will work a hardship on the State. The Assistant Director of the Department of Corrections testified: "We hope to handle around 40 from Lucasville per month."

In *Adams v. Walker*, 488 F. 2d 1064 (7th Cir. 1973), an "intrusion into the affairs of state government" case, the

Court described a "request for a stay" as a request for an "extraordinary remedy" and set forth the factors for consideration, including:

(a) Has movant shown that unless the stay is granted they will suffer irreparable injury?

(b) Where lies the public interest?

(c) Whether the stay would substantially harm other parties to the litigation.

Compliance with the Judgment is within the reasonable and ordinary capabilities of the defendants and will not substantially injure the State. The continued constitutional deprivation will injure the plaintiff class. Surely the public interest will not be disserved by providing, for 25 human beings a month, a requirement (50 square feet of living space per man) which has been conclusorily described by one United States Court *(Gates v. Collier,* 423 F. Supp. 732 (Miss. 1976)) as -

> "No one takes issue with this basic requirement for human decency and this Court holds a failure to achieve that minimal standard contravenes the Eighth Amendment prohibiting cruel and unusual punishment."

The weight of authority in the United States courts construed the Constitution as requiring 50 to 60 square feet of cell per inmate. (See Findings and Conclusions filed June 29, 1977, pages 38 and 39.) For instance, in *Palmigiano v. Garrahy,* 443 F. Supp. 956 (R.I. 1977), (3/27/78 Advance Sheets), the United States District Court in its order (pg. 987) directed the State of Rhode Island (in its maximum security prison) -

> "7. No more than one prisoner shall be confined in any cell which is less than 60 square feet."

and directed compliance in full within "nine months from the entry of this order."

F.R.C.P. 62(c) authorizes a district court "in its discretion" to "suspend" an injunction pending appeal. As a matter of discretion and for the reasons indicated, the Court concludes that the injunction of April 7, 1978 should not be suspended.

The motion for a stay is therefore denied.

/s/ Timothy Hogan
United States District Judge

Case No. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

STIPULATION AND ENTRY

Filed August 25, 1978

It is hereby stipulated and agreed between counsel for the parties, based upon the representations made to the Court in the chambers conference on August 22, 1978, that the Court's Judgment entered on April 7, 1978, shall be construed as follows:

1. "Assigned population" as used in Paragraphs 2 and 4 of the Judgment means total population including in-house, absent with leave, and absent without leave.

2. "Thirty days" as used in Paragraphs 2 and 4 of the Judgment means calendar month.

3. On or before August 31, 1978, the defendants shall reduce the assigned population of S.O.C.F. to 1,896 (one thousand eight hundred ninety six), which is twenty-five persons less than the actual assigned population on July 30, 1978, and shall reduce the assigned population by twenty-five persons every calendar month thereafter.

4. "Single cell capacity" as used in Paragraph 2 of the Judgment means 1,645 (one thousand six hundred forty five) which shall be the maximum permissible assigned

population after compliance with Paragraph 2 of the Judgment. This figure of 1,645 (one thousand six hundred forty five) is derived from the 1,620 (one thousand six hundred twenty) single residential cells at S.O.C.F. plus twenty-five, the approximate number of persons absent with leave at any given time.

5. It is further stipulated and agreed between counsel for the parties that Plaintiffs' Motions for a Rule to Show Cause and their requests for discovery are withdrawn; that Defendants' Motion for a Protective Order is withdrawn; and that Defendants shall provide the reports described in Paragraph 4 of the Judgment to counsel for the Plaintiffs on Monday of each of the four weeks following the date of this stipulation, such report to reflect the population at S.O.C.F. for the preceding Friday; at the end of that four week period, reports shall be submitted as provided by Paragraph 4 of the Judgment.

6. Counsel for the Defendants shall provide a copy of this stipulation to each of the defendants in this action.

8/24/78 Date	/s/ Timothy Hogan U.S. District Judge
8-23-78 Date	/s/ Allen P. Adler William J. Brown, Attorney General by Allen P. Adler, Assistant Attorney General Attorney for all Defendants
Aug. 23, 1978 Date	/s/ Robert P. App Robert P. App Attorney for Plaintiffs

NO. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

v.

JAMES A. RHODES, et al.,

Defendants

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION

Filed August 14, 1979
John D. Lyter, Clerk

Defendants to this case move for relief from the judgment of this Court, entered April 7, 1978 (doc. 211), and for a stay of the execution of the judgment pending the ultimate disposition of the case (doc., 258). Defendants' motion has been opposed (doc. 259), and is now submitted for the Court's consideration.

Pursuant to Federal Rule of Civil Procedure 60(b)[1] defendants move for relief from judgment on the ground that the judgment of this Court is in conflict with the recent decision of the Supreme Court of the United States in *Bell v. Wolfish*, 47 U.S.L.W. 4507 (U.S. May 14, 1979). We do not agree that the judgment is in conflict with *Wolfish*. The

[1]Defendants do not indicate pursuant to which subsection of Rule 60(b) their motion is made, but we presume that it has een made pursuant to subsection (5) and/or (6). *See generally C. Wright & A. Miller, Federal Practice and Procedure* §§ 2863, 2964 (1973).

Supreme Court in *Wolfish* was not unaware of this Court's decision in this case. In a footnote to the majority opinion, Mr. Justice Rehnquist wrote:

> Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, *e.g., Campbell v. Magruder, supra; Battle v. Anderson*, 564 F. 2d 388 (CA 10 1977); *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (Mass. 1973).... The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. *Given this factual disparity, they have little or no application to the case at hand.* Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases.

47 U.S.L.W. at 4513 n. 27 (emphasis added).[2] Given this treatment of our decision by the Court, we think that *Wolfish* provides no basis for granting defendants relief from the judgment of this Court entered on April 7, 1978. Defendants' motion, insofar as it seeks relief from judgment, is denied.

Defendants again seek a stay of the execution of the Court's April 7, 1978 judgment. By an Order dated May 8, 1978 (doc. 220) we denied a similar request by defendants. For substantially the same reasons discussed in that Order, defendants' present request is not well taken, and defendants'

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[2]In his dissenting opinion, Mr. Justice Marshall cites our decision to support the proposition, "Other courts have found that *in the circumstances before them* overcrowding inflicted mental and physical damage on inmates." 47 U.S.L.W. at 4521 n. 11 (emphasis added).

motion, insofar as it seeks a stay of the execution of the judgment of this Court entered on April 7, 1978, is denied.

Finally, there exists some uncertainty in this Court's mind whether it possesses jurisdiction not only to indicate that it is willing to consider defendants' motion, insofar as it is made pursuant to Rule 60(b),[3] but also to dispose of that motion without a remand of the case from the United Staes Court of Appeals for the Sixth Circuit, where it is now pending (No. 78-3365). In *First National Bank v. Hirsch,* 535 F. 2d 343 (6th Cir. 1976), the Sixth Circuit sought to outline the proper procedure which a party should follow when it seeks to make a Rule 60(b) motion after a notice of appeal has been filed. Although the Court noted that the "[f]iling of a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court is thereafter without jurisdicion except to act in aid of the appeal," 535 F. 2d at 345 n. 1 (citations omitted), the Court set forth the proper procedure as follows:

> [W]e think that the party seeking to file a Rule 60(b) motion...should have filed that motion in the district court. *If the district is disposed to grant the motion,* he may enter an order so indicating and the party may then file a motion to remand in this court.

Id. at 346 (emphasis added); *accord, United States v. Phillips,* 558 F. 2d 363 (6th Cir. 1977). The inference from this language in *First National Bank v. Hirsch* is, we think, that the Court possesses jurisdiction not only to indicate its willingness to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), but also to dispose of that motion, particularly since the Court chooses to deny it. *See*

---

[3]We do not think that there is any question that this Court possesses jurisdiction to consider defendants' motion, insofar as it concerns a stay of execution. *See Fed. R. App. P.* 8(a); *Fed. R. Civ. P.* 62(c).

Ferrell v. Trailmobile, Inc., 223 F. 2d 697, 699 (5th Cir. 1955); *Schattman v. Texas Employment Commission*, 350 F. Supp. 328, 330 (W.D. Tex. 1971); *rev'd. on other grounds* 459 F 2d. 32 (5th Cir. 1972); C. Wright & A. Miller, *supra* note 1, § 2873, at 265. If, however, this Court is without jurisdiction to dispose of defendants' motions, this Order serves to indicate, respectfully, to the Court of Appeals this Court's willingness to consider the defendants' motion and the disposition which we would make. *Cf. New Jersey Life Insurance Co. v. Getz*, No. C-1-75-254, slip op. at 3 n. 1 (S.D. Ohio July 3, 1979) (doc. 51) (indicating Court's uncertainty concerning whether it possessed jurisdiction to dispose of Rule 60(b) motion).

SO ORDERED.

/s/ Timothy Hogan
United States District Judge

J.A. 44

No. 78-3365

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELLY CHAPMAN, ET AL.,
Plaintiffs-Appellees

v.

JAMES A. RHODES, ET AL.,
Defendants-Appellants

ORDER

Filed November 8, 1979
John P. Hehman, Clerk

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

This matter is before the Court for consideration of the defendants-appellants' Motion to Advance Case on Calendar and Summary Reversal. In this motion, the defendants-appellants also request a stay of execution pending appeal. The plaintiffs-appellees have filed a memorandum in opposition to this motion.

Upon consideration of the defendants-appellants' request for summary reversal and the plaintiffs-appellees' response thereto, the Court concludes that summary disposition of the above appeal is not warranted at this time. The Court further concludes that the defendants-appellants have failed to meet the four criteria which must be met before a stay pending appeal will be granted, see *Reed v. Rhodes,* 549 F. 2d 1049, 1048 (6th Cir. 1976) and that their request to advance the above appeal on the Court's calendar is not well taken.

It is therefore ORDERED that the defendants-appellants'

motion for summary reversal, for an expedited hearing and for a stay are denied. Judge Celebrezze would grant the stay and advance the case for hearing.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES, et al.,

Petitioners,

-vs- No. 80-332

KELLY CHAPMAN, et al.,

Respondents.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kelly Chapman, through his attorney, respectfully moves the Court, pursuant to Rule 46 of the Rules of the United States Supreme Court, for leave to proceed in forma pauperis. Respondent is a named representative of the class of prisoners housed at the Southern Ohio Correctional Facility certified by the district court. See Chapman v. Rhodes, 434 F. Supp. 1007, 1008. Respondent did seek, and was granted, leave to proceed in forma pauperis in the district court, see 434 F. Supp. at 1008, and continued to proceed in forma pauperis in the Sixth Circuit Court of Appeals pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

For the foregoing reasons, respondent respectfully requests that his motion be allowed.

Respectfully submitted,

Jean P. Kamp
Counsel for Respondent
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

IN THE SUPREME COURT OF THE UNITED STATES

KELLY CHAPMAN, et al.,

Plaintiffs,

-v-

Case No. _____

JAMES A. RHODES, et al.,

Defendants.

AFFIDAVIT

STATE OF
COUNTY OF SS

I, Kelly Chapman, being first duly sworn, depose and say that I am a representative plaintiff in the above-entitled case; and that in support of my motion to proceed in this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. I have never worked

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Kelly Chapman
Kelly Chapman

SUBSCRIBED AND SWORN TO before me this 23 day of Sept., 1980.

Paul N. Adams
NOTARY PUBLIC PAUL N. ADAMS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES MAY 23, 1983

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion for Leave to Proceed In Forma Pauperis have been served upon the petitioners, James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, by forwarding such copies through the office of their counsel, William J. Brown, Attorney General, and Allen P. Adler and Leo J. Conway, Assistant Attorney Generals, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by United States mail, first class postage prepaid, this 26th day of September, 1980. I further certify that all parties required to be served have been so served.

Louis A. Jacobs

Louis A. Jacobs

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES, et al.,

Petitioners,

-vs-

Case No. 80-332

KELLY CHAPMAN, et al.,

Respondents.

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN SS

I, Louis A. Jacobs, being duly cautioned and sworn, depose and say:

1. I am counsel of record for the respondents in the above captioned case.

2. I am a member of the Bar of this Court.

3. This affidavit is prepared pursuant to Rule 28.2, Rules of the United States Supreme Court.

4. I personally mailed an original and one copy of the Brief in Opposition to Petition for Certiorari with accompanying documents to Mr. Michael Rodak, Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, first class postage prepaid, on September 26, 1980.

Louis A. Jacobs

Louis A. Jacobs

Sworn to before me and subscribed in my presence this 26th day of September, 1980.

Barbara Allen Baumbusch

Barbara Allen Baumbusch, Notary Public
Franklin County, State of Ohio
My Commission Expires July 9, 1981

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SUPREME COURT, U.S.

CASE NO. 80-332

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

JAMES A. RHODES, et al.

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS A. JACOBS
COUNSEL OF RECORD
Ohio State University College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

JEAN P. KAMP
The Legal Aid Society of Columbus
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113
(216) 771-0811

ROBERT K. HANDELMAN
186 East Eleventh Avenue
Columbus, Ohio 43201
(614) 294-1636

COUNSEL FOR RESPONDENTS

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DISTURB THE FINDING OF THE TRIAL COURT THAT OVERCROWDING, AND CONSEQUENT DOUBLE CELLING, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE TOTALITY OF CIRCUMSTANCES EXISTING AT THE SOUTHERN OHIO CORRECTIONAL FACILITY.

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Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978)	3
Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980)	3

STATEMENT OF THE CASE

This case involves an evaluation by the trial court, based upon testimony, documentary evidence, and a tour of the prison that "the totality of circumstances of the particular case" (A-31) of the Southern Ohio Correctional Facility constitutes cruel and unusual punishment. Petitioners mischaracterize the trial court's ruling as a decision predicated on a per se rule prohibiting double celling.

The trial court explicitly rejected that approach: "[W]e certainly are not concluding that all double celling in any 60 square foot cell is beyond the ambit." A-37. The appellate court agreed, "We do not read the opinion as holding that double celling is unconstitutional under all circumstances." (A-2) and properly described the trial court's decision: "The district court listed in its opinion a number of considerations upon which it based its finding that double celling at the particular prison in question is unconstitutional." A-2.

After the district court decision, petitioners sought relief from judgment in light of Bell v. Wolfish, 441 U.S. 520 (1979). In an Order not supplied with the petition for certiorari, but attached hereto as Respondent's Appendix, the district court found Wolfish was inappropriate and emphasized the "totality of circumstances" standard at bar. See Respondents' Appendix, p. 3, n. 2.

The remedy for the unconstitutional conditions which was ordered by the trial judge was a population reduction to 1645, the approximate rated capacity of the institution of 1620, plus 25, the number expected to be absent from the institution at any given time. (Stipulation and Entry, August 25, 1978, attached as Respondents' Appendix, p. 4.) Double celling was not by itself enjoined; indeed, the order allows double celling since the 1620 cells include cellblocks housing prisoners accused of disciplinary violations, those in protective custody, and those on death row, blocks whose cells are seldom in full use. Double celling exists today at the prison.

ARGUMENT

Both courts below decided the constitutional issue in this case by using a totality of circumstances standard. This Court has already approved that standard. In Hutto v. Finney, 437 U.S. 678, 685-86 (1978), the Court rejected an argument similar to that made by the petitioner here and held that, while solitary confinement for more than thirty days was not per se unconstitutional, it was properly enjoined under the totality of circumstances presented by the case. As part of the basis for that decision, the Court stated:

> Finally, the exercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problems at hand and his recognition of the limits on a federal court's authority in a case of this kind.
> 437 U.S. at 688.

In Bell v. Wolfish, 441 U.S. 520, 543 (1979), this Court confirmed that the totality of circumstances must be considered by citing Hutto, supra, for its holding that the short length of stay of detainees at the Metropolitan Correctional Center was one factor to be considered in the finding that no constitutional violation had been shown. The Wolfish Court clearly rejected any per se standard when considering double celling:

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.
> 441 U.S. at 542 (footnote omitted).

This case thus presents no novel issue and represents an attempt by the petitioner to gain a second appeal.

No conflict exists among the circuits with respect to the proper standard to be used in cases challenging conditions in prisons and jails. The petitioners

argue that certain decisions in the Second, Fourth, Fifth, and Eighth Circuits have held that double celling is not under all circumstances unconstitutional. This is, of course, true. As Judge Hogan pointed out in this case:

> Since the 'totality' of the circumstances differs from case to case, it is difficult to find 'controlling' authority. A-31.

In cases decided both before and after the decision in Wolfish, the Courts of Appeal have refused to establish a per se rule either allowing or prohibiting double celling.

The petitioners ask the Court to approve a "test" stated in Hite v. Leeke, 564 F.2d 670, 673-74 (4th Cir. 1977). However, that decision did not authorize double celling in a case where the totality of conditions violated the Eighth Amendment. The same court, sitting en banc, has recently held in Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978):

> In Hite v. Leeke, . . . we held that "double-celling", the housing of two prisoners in a cell initially designed for single occupancy, was not itself a violation of the Constitution. It, of course, may be a relevant factor when other consequences of overcrowding create deprivations or impose unusual restrictions and disadvantages upon the prison population.

Similarly in Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979), the court affirmed findings that double celling was constitutional in some parts of the Missouri State Penitentiary and unconstitutional in others:

> We are concerned with the action of the district court in permitting double-celling to continue permanently or indefinitely in Housing Unit 3. We do not hold categorically that putting two men in a cell with a floor space no larger than 65 square feet either is or is not constitutionally permissible. We think that a good deal may depend on the type of institution involved, the nature of the inmates, and the nature of the confinement itself. Cf. Bell v. Wolfish, supra.

The Fifth Circuit also has recently reaffirmed the totality of conditions test. In Smith v. Sullivan, 611 F.2d 1039, (5th Cir. 1980), Judge Frank Johnson,

speaking for the court, reversed an order that limited population in a city jail to 500 persons because the trial court had not first held a hearing as to overall conditions in the jail:

> It need not be repeated that federal courts should intervene in the day-to-day operations of state and local penal and detention systems only with the greatest of reluctance. . . . Where constitutional deprivations are established, either in specific instances, ... or by the totality of conditions within an institution, the federal courts may, and must, if the issue is appropriately presented, intervene. . . . As indicated above, the federal courts have the power, and the duty, to make their intervention effective. To prevent further constitutional deprivations, a court may order forms of relief not normally required by the Consitution but nevertheless necessary given the circumstances if the court's efforts are to be successful.
> 611 F.2d at 1044 (citations omitted).

The case was remanded to the district court for a hearing on the totality of conditions existing at the jail.

Respondents respectfully submit that there is no conflict between the decision of the Sixth Circuit in this case and the decisions regarding overcrowding and double celling in other circuits. Some courts have allowed double celling while others have prohibited it because of the nature of the totality of the circumstances test: the test employed by both courts in this case and approved in Bell v. Wolfish, Hutto v. Finney, and the Courts of Appeals for the Fourth, Fifth and Eighth Circuits.

The petitioners are asking this court to adopt the very rule rejected in Wolfish, and to adopt a per se approach in dealing with overcrowding as one of the conditions of confinements in particular penal institutions. The State of Ohio is asking the Court to authorize the continued and increasing overcrowding of its prison facilities.

Despite the finding of the trial court that the totality of conditions at the Southern Ohio Correctional Facility constitutes cruel and unusual punishment

and despite the holding of the Sixth Circuit that those findings were not clearly erroneous, the petitioners ask this Court to prevent the district court from ordering population reduction as the remedy for the constitutional violations found. It is respectfully urged that the constitutional problems created by overcrowding and double celling in the state penitentiaries are best handled as they are at present under the law set forth in Hutto and Wolfish, on a case by case basis. This test of totality of circumstances, which is being consistently applied by the lower courts as it was in this case, is the proper test and need not be reconsidered by the Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

LOUIS A. JACOBS
COUNSEL OF RECORD
Ohio State University College of Law
1659 North High Street
Columbus, Ohio 43210
(614) 422-6821

JEAN P. KAMP
The Legal Aid Society of Columbus
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113
(216) 771-0811

ROBERT K. HANDELMAN
186 East Eleventh Avenue
Columbus, Ohio 43201
(614) 294-1636

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Response to Petition for Writ of Certiorari have been served upon the petitioners, James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, by forwarding such copies through the office of their counsel, William J. Brown, Attorney General, and Allen P. Adler and Leo J. Conway, Assistant Attorney Generals, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by United States mail, first class postage prepaid, this 26th day of September, 1980. I further certify that all parties required to be served have been so served.

Louis A. Jacobs

APPENDIX

Page

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION August 14, 1979..... A-2

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FILED
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,)
Plaintiffs)
v.)
JAMES A RHODES, et al.,)
Defendants)

NO. C-1-75-251

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION

Defendants to this case move for relief from the judgment of this Court, entered April 7, 1978 (doc. 211), and for a stay of the execution of the judgment pending the ultimate disposition of the case (doc. 258). Defendants' motion has been opposed (doc. 259), and is now submitted for the Court's consideration.

Pursuant to Federal Rule of Civil Procedure 60(b) [1/] defendants move for relief from judgment on the ground that the judgment of this Court is in conflict with the recent decision of the Supreme Court of the United States in Bell v. Wolfish, 47 U.S.L.W. 4507 (U.S. May 14, 1979). We do not agree that the judgment is in conflict with Wolfish. The Supreme Court in Wolfish was not unaware of

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1/ Defendants do not indicate pursuant to which subsection of Rule 60(b) their motion is made, but we presume that it has been made pursuant to subsection (5) and/or (6). See generally C. Wright & A. Miller, Federal Practice and Procedure §§ 2863, 2864 (1973).

this Court's decision in this case. In a footnote to the majority opinion, Mr. Justice Rehnquist wrote:

> Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, e.g., Campbell v. Magruder, supra; Battle v. Anderson, 564 F.2d 388 (CA 10 1977); Chapman v. Rhodes, 434 F.Supp. 1007 (S.D. Ohio 1977); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (Mass. 1973).... The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases.

47 U.S.L.W. at 4513 n. 27 (emphasis added). 2/ Given this treatment of our decision by the Court, we think that Wolfish provides no basis for granting defendants relief from the judgment of this Court entered on April 7, 1978. Defendants' motion, insofar as it seeks relief from judgment, is denied.

Defendants again seek a stay of the execution of the Court's April 7, 1978 judgment. By an Order dated May 8, 1978 (doc. 220) we denied a similar request by defendants. For substantially the same reasons discussed

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2/ In his dissenting opinion, Mr. Justice Marshall cites our decision to support the proposition, "Other courts have found that in the circumstances before them overcrowding inflicted mental and physical damage on inmates." 47 U.S.L.W. at 4521 n. 11 (emphasis added).

in that Order, defendants' present request is not well taken, and defendants' motion, insofar as it seeks a stay of the execution of the judgment of this Court entered on April 7, 1978, is denied.

Finally, there exists some uncertainty in this Court's mind whether it possesses jurisdiction not only to indicate that it is willing to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), 3/ but also to dispose of that motion without a remand of the case from the United States Court of Appeals for the Sixth Circuit, where it is now pending (No. 78-3365). In First National Bank v. Hirsch, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit sought to outline the proper procedure which a party should follow when it seeks to make a Rule 60(b) motion after a notice of appeal has been filed. Although the Court noted that the "[f]iling of a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court is thereafter without jurisdiction except to act in aid of the appeal," 535 F.2d at 345 n. 1 (citations omitted), the Court set forth the proper procedure as follows:

> [W]e think that the party seeking to file a Rule 60(b) motion....should have filed that motion in the district court. If the district

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3/ We do not think that there is any question that this Court possesses jurisdiction to consider defendants' motion, insofar as it concerns a stay of execution. See Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(c).

> is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court.

Id. at 346 (emphasis added); accord, United States v. Phillips, 558 F.2d 363 (6th Cir. 1977). The inference from this language in First National Bank v. Hirsch is, we think, that the Court possesses jurisdiction not only to indicate its willingness to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), but also to dispose of that motion, particularly since the Court chooses to deny it. See Ferrell v. Trailmobile, Inc., 223 F.2d 697, 699 (5th Cir. 1955); Schattman v. Texas Employment Commission, 350 F.Supp. 328, 330 (W.D. Tex. 1971), rev'd on other grounds, 459 F.2d 32 (5th Cir. 1972); C. Wright & A. Miller, supra note 1, § 2873, at 265. If, however, this Court is without jurisdiction to dispose of defendants' motions, this Order serves to indicate, respectfully, to the Court of Appeals this Court's willingness to consider defendants' motion and the disposition which we would make. Cf. New Jersey Life Insurance Co. v. Getz, No. C-1-75-254, slip op. at 3 n. 1 (S.D. Ohio July 3, 1979) (doc. 51) (indicating Court's uncertainty concerning whether it possessed jurisdiction to dispose of Rule 60(b) motion).

SO ORDERED.

United States District Judge

JOHN D. LYTER, CLERK
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs,

-vs-

JAMES A. RHODES, et al.,

Defendants.

Case No. C-1-75-251

J. HOGAN

Indexed
Docketed ✓
Journal ✓
Motion
Issue counsel
Card

STIPULATION AND ENTRY

It is hereby stipulated and agreed between counsel for the parties, based upon the representations made to the Court in the chambers conference on August 22, 1978, that the Court's Judgment entered on April 7, 1978, shall be construed as follows:

1. "Assigned population" as used in Paragraphs 2 and 4 of the Judgment means total population including in-house, absent with leave, and absent without leave.

2. "Thirty days" as used in Paragraphs 2 and 4 of the Judgment means calendar month.

3. On or before August 31, 1978, the defendants shall reduce the assigned population of S.O.C.F. to 1,896 (one thousand eight hundred ninety six), which is twenty-five persons less than the actual assigned population on July 30, 1978, and shall reduce the assigned population by twenty-five persons every calendar month thereafter.

4. "Single cell capacity" as used in Paragraph 2 of the Judgment means 1,645 (one thousand six hundred forty five) which shall be the maximum permissible assigned population after compliance with Paragraph 2 of the Judgment. This figure of 1,645 (one thousand six hundred forty five) is derived from the 1,620 (one thousand six hundred twenty) single residential cells at S.O.C.F. plus twenty-five, the approximate number of persons absent with leave at any given time.

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5. It is further stipulated and agreed between counsel for the parties that Plaintiffs' Motions for a Rule to Show Cause and their requests for discovery are withdrawn; that Defendants' Motion for a Protective Order is withdrawn; and that Defendants shall provide the reports described in Paragraph 4 of the Judgment to counsel for the Plaintiffs on Monday of each of the four weeks following the date of this stipulation, such report to reflect the population at S.O.C.F. for the preceding Friday; at the end of that four week period, reports shall be submitted as provided by Paragraph 4 of the Judgment.

6. Counsel for the Defendants shall provide a copy of this stipulation to each of the defendants in this action.

8/24/78
Date

U.S. District Judge

8-23-78
Date

William J. Brown, Attorney General
by Allen P. Adler, Assistant
Attorney General
Attorney for all Defendants

Aug 23, 1978
Date

Robert P. App
Attorney for Plaintiffs

FILED
OCT 14 1980
MICHAEL RODAK, JR., C

Case No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414
Counsel of Record

LEO J. CONWAY
Assistant Attorney General
Of Counsel
ATTORNEYS FOR PETITIONERS

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

The question posed by petitioners is:

> Whether the double celling of prison inmates constitutes cruel and unusual punishment where the record indicates that the practice does not deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety.

Respondents' brief in opposition to certiorari, in asserting that no conflict exists among the circuits, that no novel issue exists, and that a non important issue has been presented mistakes not only what issue is presented but what occurred in the district court below.

Initially, respondants suggest that the present case did not involve the issue of double celling as a practice in and of itself, but only as an incident to a larger issue of overcrowding. Thus, for example, respondents assert that petitioners seek authorization to continue overcrowding. (Respondents' brief, page 4). The issue in the case however has always been the legitimacy of double celling itself. The district court's opinion establishes this without question. In finding liability, the district court stated variously:

> It is our conclusion overly and on balance that the double celling at Lucasville is unconstitutional. (A 34);
>
> . . . this Court is not in any position to do aught but conclude and declare that double celling at Lucasville is federally unconstitutional. (A 37).

Moreover, in ordering relief, the district court stated:

> . . . the State must proceed with reasonable dispatch to formulate, propose, and carry out some plan which will terminate double celling. (A 37).

Reference to the record of this case simply establishes that questions as to the number of prisoners at the Southern Ohio Correctional Facility were incidental to the challenge to double celling and not the reverse. It is this fundamental distinction which causes respondents' mischaracterization of the standard employed by the district court.

Petitioners assert that the holding of the district court is a functional per se finding against double celling. While asserting that it utilized the "totality of circumstances approach" suggested by this Court, the district court failed to make the findings which are required to support such a holding. *Hutto v. Finney*, 437 U.S. 678, 687 (1978). Respondents cite an excerpt from *Bell v. Wolfish*, 441 U.S. 520, 543 (1979) (Respondents' brief, page 2), that confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the due process clause. It is significant that nowhere in its opinion does the district court specifically find that double celling at the Southern Ohio Correctional Facility caused any inmate genuine privation or hardship.

Indeed, other than boldly asserting that the district court followed the correct standard, respondents do not elaborate on the alleged "intolerable conditions" at the Southern Ohio Correctional Facility. Instead, respondents continue to focus only on the number of prisoners in the institution, not on whether such prisoners have

been deprived of constitutional right.

That the district court did not follow either the approach suggested by this Court in *Bell v. Wolfish, supra* or the totality of circumstances approach of *Hutto v. Finney, supra,* is most clearly seen in the relief that the district court ordered. Respondents correctly point out that despite initially stating that he was finding double celling at the Southern Ohio Correctional Facility to be cruel and unusual punishment and ordering a plan to eliminate double celling, the district court ultimately ordered a plan which reduced the population at the Southern Ohio Correctional Facility but did not eliminate double celling. (A 41). Rather than undercutting the desirability of certiorari such confused relief enhances it. Petitioners whole view is that the district court decision is an ad hoc judgment unsupported by the record when judged by the appropriate tests.

Petitioners, of course, have not, in their petition, separately challenged the relief ordered by this district court upon a finding of liability. Instead petitioners have challenged the finding of liability itself. While if a finding of liability were justified, the failure of the district court to grant the least intrusive relief might be arguable, the national importance of this issue is whether prison populations may be limited by a "one man - one cell" standard. In light of the record in this case, certiorari should be granted to give definitive guidance to the courts below.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414
Counsel of Record

LEO J. CONWAY
Assistant Attorney General
Of Counsel

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief to Brief in Opposition to Certiorari have been served on respondents, Kelly Chapman, # 122-531, P.O. Box 45699, Lucasville, Ohio 45699 and Richard Jaworski, # 734304, River Junction Correctional Institute, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210; Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215; Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio 44113; and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio 43201, by United States mail, postage prepaid this _____ day of October, 1980. I further certify that all parties required to be served have been so served.

ALLEN P. ADLER
Assistant Attorney General

OCT 6

MICHAEL RODAK,

Case No. 80-332

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

v.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of Amicus Curiae State of Oregon in Support of Petition for Writ of Certiorari

JAMES M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAN PETER LONDAHL
Counsel of Record
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Attorneys for Amicus Curiae

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In the Supreme Court of the United States

Case No. 80-332

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JAMES A. RHODES, et al.,

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v.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of the State of Oregon, Amicus Curiae, in Support of Petition

Amicus, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 6, 1980.

STATEMENT OF INTEREST

The United States District Court for the District of Oregon has recently held that conditions at the Oregon State Penitentiary, the Farm Annex, and the Oregon State Correctional Institution violate the Eighth Amendment. *West v. Atiyeh,* Civil No. 80-6014 (Opinion filed August 22, 1980). The District Court opinion relies upon *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) in support of its conclusion.

SUMMARY OF ARGUMENT

Notwithstanding the Sixth Circuit's conclusion that the District Court opinion in *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) does not hold double celling unconstitutional *per se,* the net effect of the opinion is to do just that because all of the "additional factors" relied on by the District Court in framing its conclusion that under the totality of the circumstances the conditions at the Southern Ohio Correctional Facility violate the Eighth Amendment are either necessarily entailed by double celling or are entailed by the condition of incarceration for a serious offense. A conflict in the circuits is therefore presented as to whether double celling is unconstitutional *per se.*

The increasing volume of lower federal court cases treating the issue of the interface of prison conditions with the Eighth Amendment have developed a confused and confusing welter of standards which bear little or no relation to the history and language of the Amendment and provide no guidelines against which local prison officials may measure local conditions and comply with constitutional requirements. This case presents an appropriate vehicle for setting standards.

If a modern, well run penitentiary like the facility at Lucasville violates the Eighth Amendment simply because it is over design capacity, the anomaly is

presented that nearly every correctional facility in this country is, for constitutional purposes, "unusual" within the meaning of the Eighth Amendment. Such a result is wholly inappropriate.

ARGUMENT

In *Chapman v. Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) the court found that the conditions of confinement at the Southern Ohio Correctional Facility in Lucasville, Ohio, constituted cruel and unusual punishment in violation of the Eighth Amendment. 434 F. Supp., at 1020. The Court reached this conclusion notwithstanding its express findings of fact that food was adequate, staffing was acceptably proportionate, ventilation was adequate, medical and dental care were not unconstitutionally denied, violence was not increased due to double celling, and there was no factual support for allegations that visitation, plumbing, lighting, law library facilities, or school facilities were inadequate due to overcrowding. In addition to the fact that double celling was occurring, due to an inmate population 38% over design capacity, the District Court supported its conclusion that an Eighth Amendment violation existed with findings that there are not enough jobs to go around, double celling interferes with studying, and psychological and social worker staffs were numerically inadequate. The stated reasons for the finding that "overly and on

balance . . . the double celling at Lucasville is unconstitutional," 434 F. Supp., at 1020, all relate to either double celling *per se* or conditions that are necessarily entailed in incarceration for a serious offense. No other consequences of double celling are acknowledged as weighing in the calculus. 434 F. Supp., at 1020-21.

The Court's statement of the legal standards against which the facts are measured is modest and fairly traditional. The restraint of *Procunier v. Martinez,* 416 U.S. 396 (1973), is formulaically uttered;[1] evolving standards of decency are evoked, although the citation is to *Weems v. United States,* 217 U.S. 349 (1910), rather than *Trop v. Dulles,* 356 U.S. 86 (1958); the "shocking to the conscience" test appears, through the filter of *Holt v. Sarver,* 309 F. Supp. 362 (E. D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971), rather than

[1] "Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and indadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974).

by direct citation to *Rochin v. California,* 342 U.S. 165 (1952); and, finally, the standards are reiterated and modified in the "totality of the circumstances" test:

> "The question is constantly stated as one of ascertaining the 'totality of the circumstances' of the particular case and then inquiring into whether the totality as determined is intolerant or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience." 434 F. Supp., at 1019.

On appeal, the Sixth Circuit did not hold that a *per se* approach to double celling was impermissible. Rather, it rejected the defendant's contention that the District Court had held that double celling was unconstitutional *per se.* The Court found that a totality of the circumstances approach had been applied, distinguished *Bell v. Wolfish,* 441 U.S. 520 (1979), and perfunctorily affirmed:

> "Upon consideration of the record on appeal together with the brief and oral arguments of counsel the court concludes that the findings of fact of the district court are not clearly erroneous, that its conclusions of law are permissible from the findings of fact and that the remedial provisions are a reasonable response to the violations which were found."

The Sixth Circuit's opinion embodies a curious standard of constitutional review for a case of this magnitude, but there are three more important issues presented in this litigation which should be addressed by this Court: a) Does the District Court opinion in

fact hold, despite language to the contrary, that double celling is *per se* a violation of the Eighth Amendment, and if so, was that holding proper; b) what is the appropriate standard for determining whether prison conditions violate the terms of the Eighth Amendment; and c) do the conditions at Lucasville constitute cruel and unusual punishment?

There is, as the petition for writ of certiorari notes, a conflict in the circuits as to whether double celling is unconstitutional *per se*. *Compare Johnson v. Levine,* 588 F.2d 1378 (4th Cir. 1978); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976), *with Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977), which cites *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); and *Finney v. Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974) in support of its apparent conclusion that overcrowding is *per se* unconstitutional.

The district court's opinion in *Chapman* purports to employ the "totality of the circumstances" test as the standard for its conclusion that the conditions at Lucasville are cruel and unusual. The conclusion is said to rest on five premises: i) The inmates are "long term", ii) the facility is 38% over design capacity, iii) the allocated living space per inmate, not counting bay and hallway areas, is 30-35 square feet; and various

manuals and cases conclude that only a greater area is minimally acceptable, iv) the prisoners must spend a substantial period of time in the cell, and v) double celling is not contemplated as a temporary phenomenon; it is, rather, a continuing problem. *Chapman v. Rhodes, supra,* 434 F. Supp. at 1020-21. These premises are all either necessary and self-evident concomitants of double celling or they are rather unremarkable indications that inmates are incarcerated for the commission of serious offenses. They are not, in any reasonable sense, factors distinct from double celling to be considered in analyzing the totality of the circumstances.

The fact that the inmates are "long term" merely connotes that the facility at Lucasville is a penitentiary, not a pretrial holding facility; the convicts are felons. It necessarily follows from the fact of double celling in this context that design capacity is exceeded. The excess of 38% over design capacity here is not an additional factor, it is merely a quantification of the extent of double celling. Similarly, the fact that the average double celled inmate has "something in the neighborhood of 30-35" square feet per man adds nothing to analysis. It is not an additional factor, but a simple division of the square footage of a single cell.[2]

[2]It should be noted that opinions are divided on the method of computing square footage in overcrowding cases. In *West v. Edwards,* 439 F. Supp. 722

(Continued on following page)

That the majority of double celled inmates spends 14 hours a day in their cells, 434 F. Supp., at 1013, connotes that the inmates are imprisoned. Their freedom of movement has been restricted. Absent a consideration of the quality of the area of confinement and the inmate's use of the time — much of it, presumably, spent sleeping — confinement in a cell cannot be an additional factor in the analysis.[3] The fact that double celling is a continuing problem does not add to or modify the fact of double celling. If the criteria identified by the Court are to count as "additional consequences" of the fact of double celling rather than an elaboration of that fact, then there can hardly be such a thing as double celling *per se.* A reasoned analysis of

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(Continued from previous page)

(D.S.C. 1977), a case involving triple celling, the Court computed the square footage per man by including bays and hallways, citing *Ambrose v. Malcolm,* 414 F. Supp. 485 (S.D.N.Y. 1976), in support of its method. *West v. Edwards* held that triple celling, absent other deleterious conditions, did not constitute a violation of the Eighth Amendment. The square footage computation method of determining whether an institution is unconstitutionally overcrowded is, of course, open to a wide range of objections. Most obviously, the method does not account for the fact that the available space for a single inmate in a cell is the square footage of the cell minus the mass of the other objects in the cell. And it does not factor the quality of the space.

[3]L. Orland, Justice, Punishment, Treatment: The Correctional Process 278 (1973) relates the following comparison by an inmate between conditions in "the hole" and conditions in a cell:

> "The second thing that was very important was that I carefully measured the length and width of the hole, and then when I got out I measured the length and the width of the cell by paces and they were exactly the same, but they were worlds apart and I was overwhelmed with how beautiful it is to be in a cell as opposed to being in the hole. The cell is really wonderful place to be, wonderful in contrast to the hole. And the luxuries that were heaped on me. I could see in front of me and I had a blanket and I had a mattress. All this incredible luxury."

the application of the Eighth Amendment in the context of double celling is not advanced by breaking out the necessary constituent elements of double celling and incarceration in general and describing them separately as if they were not contained in the initial description.

The District Court in *Chapman,* while holding that the totality of the circumstances shock the conscience, premises that conclusion almost entirely on the double celling condition and its necessary concomitants. The other identified deficiencies — numerically inadequate psychological and social work staff, some interference with study, and lack of jobs — are not of independent constitutional significance and may be fairly characterized as trivial. There is, therefore, a substantial argument that *Chapman* holds double celling to be unconstitutional *per se*; and an issue that divides the circuits is presented.

Even if this case does not properly pose the issue of whether double celling is *per se* unconstitutional, the facts, as developed in the District Court opinion, reflect a modern, well-organized penal institution coping more than adequately with the effects of a national trend resulting in higher prison populations. The Southern Ohio Correctional Facility, judging from the facts elucidated in the opinion, is an above average penal institution. If the decision in *Chapman* stands,

it strongly suggests the anamolous result that the majority of correctional institutions in this country must be termed "unusual" under the Eighth Amendment. Indeed, the litigation in the lower federal courts would indicate that those courts have already concluded that the majority of prisons are unusual. A recent survey demonstrates that,

> "The federal district courts have decided reported cases involving adult prisons (juvenile facilities were excluded from analysis) in 29 jurisdictions. These included ten states, thirteen counties, four cities, Puerty Rico and the Virgin Islands. There were 49 cases relating to these jurisdictions and in almost all of them, violations of the constitutional rights of prisoners were found." Fair, the Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions, 7 Am. J. Crim. Law 119, 124 (1979).

Tucker, The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, 7 B.C. Env. Aff. L. Rev. 665 (1979), identifies 29 federal district court cases in which major prison reform was ordered and 25 cases in which major jail reform was ordered. *Id.,* at 679-680, fn 97-98. There are very few federal cases which hold that a given penal institution does not have conditions which violate the Eighth Amendment. These results are largely attributable to the ill-defined, subjective nature of the tests being employed to determine whether conditions are cruel and unusual coupled with the privileged economic and

social backgrounds of the individuals applying those tests.

There are at least four primary standards currently in use for determining whether prison conditions violate the Eighth Amendment. The four primary standards are: 1) Evolving Sense of Decency, 2) Shock to the Conscience, 3) a Balancing Test, and 4) the Totality of the Circumstances Test. These tests are often mixed and melded haphazardly within a given opinion and they often accompany one or more of a half-dozen other subsidiary standards currently in use. Professor Fair, in the article cited above, distinguishes five separate tests and has catalogued the opinions in which they are employed. His survey of district court cases concludes that the Evolving Standards of Decency Test is used in 66% of the cases, Totality of the Circumstances in 45%, the Balancing Test in 45%, Shock to the Conscience in 41%, and a Least Restrictive Means Test like that disapproved in *Bell v. Wolfish,* 441 U.S. 520 (1979), in 34% of the cases, most of which are pretrial detention cases.

We offer the following rough survey of recent circuit court cases sorted by the tests employed:

EVOLVING STANDARDS OF DECENCY

The Evolving Standards of Decency Test is, as Professor Fair documents, probably the single most popular standard for determining whether conditions

of prison confinement violate the Eighth Amendment. The test is based on dictum in the plurality opinion of Chief Justice Warren in *Trop v. Dulles, supra,* which in turn relies on *Weems v. United States, supra*:

> "The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S., at 100-01.

This language does not, of course, state a standard. It points to an unarticulated and perhaps unarticulable standard of "human decency." The test, insofar as it is a standard at all, has been widely criticized as hopelessly subjective and class determinate; one man's indecency may be another's aspiration. The Evolving Standards of Decency Test has been used in the following recent federal circuit court cases: *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977); *Nadeau v. Helgemoe,* 561 F.2d 411 (1st Cir. 1977); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections,* 529 F.2d 854 (4th Cir. 1975).

SHOCK THE CONSCIENCE TEST

The Shock the Conscience Test is arguably more rigorous than the Evolving Standards of Decency Test. Although it is equally subjective, it should require conditions that actually shock a reasonable person, not a person who, because of social and economic back-

ground, is shocked by the very existence of poverty and the status of incarceration.[4] Federal courts have managed to be shocked in nearly every instance in which the question has arisen. The standard is derived from the Due Process analysis of *Rochin v. California,* 342 U.S. 165 (1951):

> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." 342 U.S., at 172.

That the Shock the Conscience Test is a coordinate of the Evolving Standards of Decency Test as established in *Trop v. Dulles* is manifested by the language with which Justice Frankfurter lays the foundation:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of

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[4] At least one federal district court, after observing that, "I discover in the cases scarcely a single beam or joist in a framework of principles within which a particular constitutional challenge to a particular prison regulation can be decided," *Morales v. Schmidt,* 340 F. Supp. 544, 548 (W.D. Wisc. 1972), expressly concluded that,

> "With respect to the intrinsic importance of the challenges, I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." *Id.,* at 548-549.

> justice of English-speaking peoples even towards those charged with the most heinous offenses.' *Malinski v. New York, supra,* 324 U.S. at 416, 417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cordozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 342 U.S., at 169.

If the "double bunking" practices outlined in *Bell v. Wolfish, supra,* do not offend the Due Process Clause, it is difficult to perceive how they can violate the Eighth Amendment under this standard, unless pure duration is the controlling consideration.

The Shock the Conscience Test has been employed in the following circuit court cases: *Nadeau v. Helgemoe, supra; Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976); *French v. Heyne,* 547 F.2d 994 (7th Cir. 1976); *Holt v. Sarver,* 442 F.2d 304 (8th Cir. 1971); *Sweet v. South Carolina Dept. of Corrections, supra.*

BALANCING TEST

Courts have, in examining the deprivations complained of by inmates as a result of confinement, balanced "the legitimate rights of the prisoner [with] the necessary concern and responsibility of the prison authorities for security and order." *Sweet v. South Carolina Dept. of Corrections, supra,* 529 F.2d, at 860.

The Balancing Test is often dovetailed with what has been called the Penological Purpose Test which requires that all punishments must be related to a legitimate penological purpose:

> "The Supreme Court recently identified three legitimate functions of a correctional system: deterrence, both specific and general; rehabilitation; and institutional security. *Pell v. Procunier,* 417 U.S. at 8222-23, 94 S. Ct. 2800. 'it is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.' *Id.* at 823, 94 S. Ct. at 2804. Therefore, when a prison policy advances one of these valid goals, the Court is required to weigh the competing interests of the prisoner and of the state in pursuing that goal. When an inmate is restricted in a manner which supports no such valid purpose, that restriction cannot stand." *Pugh v. Locke,* 406 F. Supp. 318, 328 (M.D. Ala. 1976).

Nadeau v. Helgemoe, supra, while it rejects the standard, identifies ten federal cases that have either relied on the Penological Purpose Test or have attempted to coordinate it with a more "traditional" analysis. The Balancing Test has been applied in the following circuit court cases: *Crowe v. Leeke, supra, Sweet v. South Carolina Dept. of Corrections, supra, Finney v. Arkansas Bd. of Corrections, supra.*

TOTALITY OF THE CIRCUMSTANCES

The Totality of the Circumstances Test incorporates a holistic approach and is often employed to hold

the aggregate conditions in a prison unconstitutional even though no single constituent element is, in itself, unconstitutional. The Totality of the Circumstances Test is adequately stated in *Chapman.* The test has been applied in the following cases: *Johnson v. Levine,* 588 F.2d 1378 (4th Cir. 1978); *Williams v. Edwards,* 547 F.2d 1206 (5th Cir. 1977) *French v. Hayne, supra; Sweet v. South Carolina Dept. of Corrections, supra; Gates v. Collier, supra; Finney v. Arkansas Bd. of Corrections, supra.*

In addition to the more common tests, federal courts are currently developing standards around language found in earlier circuit court cases. The suggestion in *Novak v. Beto,* 453 F.2d 661, 665 (5th Cir. 1971), that the deprivation of basic elements of hygiene violates the Eighth Amendment has acquired the status of an Eighth Amendment test. *See, Costello v. Wainwright,* 525 F.2d 1239 (5th Cir. 1976); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974); *Campbell v. Beto,* 460 F.2d 765 (5th Cir. 1972). The *Novak* formulation was broadened by influential language in *Newman v. Alabama,* 449 F.2d 283 (5th Cir. 1977):

> "It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanita-

> tion, and necessary medical attention." 449 F.2d, at 286.

See also Battle v. Anderson, supra; Finney v. Arkansas Bd. of Corrections, supra. The "test" evolved again when its focus was shifted in *Battle v. Anderson, supra,* which cites a group of cases for the proposition that,

> "Courts have also evaluated quality of life in penal facilities and demanded a healthy environment with adequate sanitation, ventilation, lighting and utilities . . ." 564 F.2d, at 394.

Battle cites *Estelle v. Gamble,* 429 U.S. 97 (1976) for guidance:

> "We are guided by the fact that the United States Supreme Court has not wavered in its holding that the Eighth Amendment to the United States Constitution prohibiting the imposition of cruel and unusual punishment is, *inter alia,* intended to protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." 564 F.2d, at 393.

It should be evident that the Eighth Amendment standards employed are extremely fluid. The standards bear little or no relation to the history of the Eighth Amendment or its language; and the resolutions in the federal courts often, as a result, merely state gestalt conclusions devoid of principled analysis. The very fluidity of the standards should indicate the

care with which they are to be applied and considerations of federalism and separation of powers should act as an astringent in that application. But the lower federal courts' inevitable incantation of the admonition of *Procunier v. Martinez, supra,* fn. 1, is invariably dissipated by the formula that constitutional deprivations, "simply cannot be countenanced, and this Court is under a duty, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights." *Pugh v. Locke, supra,* 406 F. Supp., at 328.

In the seven years since this Court acted in *Procunier v. Martinez* to protect identifiable First Amendment rights from unnecessary dilution through prison regulation, the federal courts have, with increasing frequency, acted as "front line agencies for the consideration and resolution of the infinite variety of prisoner complaints." *Procunier v. Martinez,* 416 U.S., at 405 n. 9. When, as in this and all prison overcrowding cases, those complaints are not tied to any other constitutionally guaranteed right, prisoners have invoked the Eighth Amendment and found solace in the conscience of the Courts. As a consequence, the moral ideal embodied in the Eighth Amendment has been reduced to a jurisdictional base from which federal district courts can impose apparently unreviewable architectural and penological standards upon the states.

As a consequence of the confusion as to the appropriate standard or standards, the subjective nature of the existing standards, and the laxity with which the standards are applied, there are

> ". . . no guidelines by which state prison authorities might anticipate litigation and voluntarily conform to federal constitutional standards that are binding on the states. Mere moral outrage by a federal judge does little to provide prison officials with any basis for establishing prison policies and criteria of confinement." Robbins, Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights, 26 Kan. L. Rev. 551, 554 (1978).

This case provides an appropriate vehicle for this Court to establish a benchmark against which other prison condition cases may be measured. In *Chapman,* as in *Battle v. Anderson, supra,* the conclusion that overcrowding is cruel and unusual appears unassailable only because it is nonanalytic. While all might agree that the Black Hole of Calcutta constituted cruel and unusual punishment due to overcrowding, the question is ordinarily one of degree. But the fact that the issue involves judgments of degree does not make its resolution unreviewable. The conditions outlined in *Chapman* are simply of a different order than the conditions outlined in *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969); and the standards for determining whether an Eighth Amendment violation exists can

and ought to reflect that difference. This Court has never squarely addressed the important questions posed by this case. It should take this occasion to do so.

CONCLUSION

For the reasons outlined above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAN PETER LONDAHL
Assistant Attorney General
Attorneys for Amicus Curiae

DEC 22 19
MICHAEL RODAK,

No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR PETITIONERS

QUESTION PRESENTED

WHETHER THE DOUBLE CELLING OF PRISON INMATES CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHERE THE RECORD INDICATES THAT THE PRACTICE DOES NOT DEPRIVE INMATES OF MINIMUM CONSTITUTIONAL GUARANTEES TO ADEQUATE FOOD, CLOTHING, SHELTER, SANITATION, MEDICAL CARE AND PERSONAL SAFETY.

PARTIES

The petitioners in this action are James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, as the successor to Arnold R. Jago, a named defendant in the courts below. The respondents are Kelly Chapman and Richard Jaworski, the named plaintiffs in the courts below for a class of all inmates at the Southern Ohio Correctional Facility.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (P. A. 2). The decision of the United States District Court for the Southern District of Ohio, Western Division is reported as *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977). (P. A. 4).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered June 6, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254(1). The petition for a writ of certiorari was filed on September 2, 1980. Certiorari was granted November 3, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 10, 1975, Kelly Chapman and Richard Jaworski, inmates incarcerated at the Southern Ohio Correctional Facility (hereinafter "SOCF"), filed a petition under 42 U.S.C. §1983 attacking their conditions of confinement by seeking injunctive relief and damages. Following the appearance of counsel for all parties, the case was allowed to proceed as a class action. The class was made up of all 2300 inmates at SOCF.

The Southern Ohio Correctional Facility is Ohio's only maximum security penitentiary and was built in the early 1970's at a cost of thirty-two million dollars. (P.A. 9)[1] The institution is located on a huge rural tract of land and consists of several contiguous buildings occupying more than twenty (20) acres under a single roof. (P.A. 9; Plaintiffs' Exhibit 34). SOCF contains 1620 cells, two 10-bed hospital wards, and twenty (20) hospital cells (P.A. 10, 13). The institution was designed at a time when prison populations throughout the country were on the decline. (P.A. 10). At the time of trial the trend had reversed. The population at SOCF had risen by thirty-eight percent (38%) from 1972 to 1977 (P.A. 13).

The institution is made up of three major units; K-Complex, L-Complex, and J-Complex. K-Complex and L-Complex each contain eight (8) cell blocks intersecting the central corridor, with a gymnasium at one end and access to the rest of the facility at the other end. Each cell block has an upper and lower range or tier. Each range has a shower located close to the guard console. J-Complex is a more secure version of K and L-Complexes and contains only four (4) cell blocks and the central corridor. J-Complex housed death row inmates and those in long-term administrative isolation. The cell ranges are similar to K and L, with the exception of J-1 Block which contains twenty (20) cells.

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[1]Citations to the appendix to the petition for a writ of certiorari will be abbreviated P.A.

The complexes share common support facilities, including a well-stocked library, holding 25,000 volumes and modern school facilities. In addition, the institution contains two chapels, a commissary, barbershop, kitchen, two (2) dining halls and an industrial area which includes the prison laundry, a machine shop, a shoe factory, a sheet metal shop, print shop, sign shop, and a small engine repair shop. At the entrance to the institution are the administrative offices, a large visiting room, the infirmary, and the housing for inmates on merit status, D-Block. There is an adequate recreation field and an outdoor visitation area with a children's playground.

The cells used by the general population of SOCF are of two types. There are 660 inside cells, having three solid walls and a barred entrance. Inside cells measure six feet by ten feet six inches, or sixty-three (63) square feet, and are nine (9) feet high. There are 960 outside cells, each measures six feet six inches by ten feet six inches, or sixty-eight and one quarter (68.25) square feet, and are nine (9) feet high. Outside cells are built along the outside wall of the block and have a window (P.A. 13, 14).

The inside cells are located in the merit Block D-2, Blocks J-1 through J-4 and Blocks K-1 through K-4. At the time of trial, approximately 1400 men were double-celled. All cells in K-2 and K-3, most of the cells in K-4 and some of the cells in J-4 were doubled. Cell blocks D-2 (merit), K-1 (protective custody), J-1 (super max), J-2 (disciplinary isolation) and J-3 (death row) were single-celled. Of the inside cells, approximately 350 were single-celled. (P.A. 13). More than half of the 960 outside cells, located in Blocks K-5 through K-8 and L-1 through L-8, were double-celled. All cells were suitably furnished and had hot and cold running water. Double-celling was accomplished by adding a top bunk (P.A. 14).

Upon arrival at SOCF, all inmates were housed in K-5 Block for about two weeks. After being classified, an inmate

was assigned to another block. Cell blocks K-6 through K-8 housed inmates with trade or vocational assignments. Cell blocks L-1 through L-8 housed inmates attending school or holding jobs. Blocks K-3 and K-4 held prisoners classified as "voluntarily idle." K-2 Block was classified as "limited activity" and housed those who had requested protective custody but could not substantiate their needs (P.A. 16).

An individual's classification and cell assignment determined the amount of time he was allowed out of his cell. Inmates living in Blocks D-2, K-6 through K-8 and L-1 through L-8, the majority of those double-celled, were free to be out of their cells from 6:30 a.m. to 9:30 p.m. During the day, these inmates were at meals, at recreation, in the library, working, attending school, seeing visitors, showering, or in the various dayrooms. These men, along with inmates housed in Blocks K-3 and K-4, visited the commissary once a week and were allowed a weekly movie. These inmates were also able to attend weekly religious services (P.A. 15-17).

Men housed in Blocks K-3, K-4 and K-5 were permitted two to four hours out-of-cell exercise per week, ate in the dining hall and visited in the visiting room. Similarly, inmates in K-2 and J-4 had limited out-of-cell activity (P.A. 17-18). As noted above, all other inmates, those in tight security and locked in most of the time, were single-celled.

Approximately seventy-five percent (75%) of the double-celled inmates were permitted out of their cells most of the day (P.A. 18). For those confined in double-cells most of the day, the time limitation was a direct result of their classification. They had either requested their classification or were classified to an idle or isolation block because of past discipline or behavior problems.

Following the filing of a second amended complaint, which contained no prayer for damages (J.A. 14), the case proceeded to trial on May 23, 1977, and was concluded on May 27, 1977.

The district court found that the class of SOCF inmates alleged they had been subjected to cruel and unusual punishment in violation of the Eighth Amendment, in that:

1. Violence and terror to an impermissible degree resulted from the practice of placing two inmates in the same cell.
2. The number of guards and employees providing services to the inmate population was inadequate to serve the population, and the shortage of personnel had fostered violence and a lawless atmosphere;
3. The inmates were not properly fed because food services were overtaxed;
4. Overcrowding had limited access to the courts;
5. Heating and ventilation systems were not adequate;
6. Medical services were overtaxed; and
7. Inmate job opportunities and access to educational programs had been denied, thereby affecting the rehabilitation process (P.A. 8-9).

The district court concluded that SOCF was a first-class facility (P.A. 9). Food was adequate both in quality and quantity (P.A. 18-20). Ventilation was adequate (P.A. 20). The incidents of violence were within normal limits for a prison (P.A. 21, 29). Visiting privileges were good, if not exceptional (P.A. 20). The ratio of inmates to guards was well within acceptable standards (P.A. 21). Plumbing and lighting were completely adequate (P.A. 21). There had been some assignment of extra men to existing jobs, but this "watering down" of jobs made more jobs available. (P.A. 22-23). No complaint was made about classroom and library facilities. There was no evidence that any inmate was denied an opportunity for education, but it was found that some had their educations delayed (P.A. 23) The law library was adequate (P.A. 21). No credible evidence was presented to

the district court to demonstrate any constitutional inadequacy in the area of medical services (P.A. 24-25). Any deficiency in dental services was due not to the double-celling of inmates or the increased population, but rather to the lack of a dentist (P.A. 34). It was also found that the number of psychologists and social workers had not increased along with the inmate population (P.A. 26).

The alleged increase in violence brought about by double-celling, described as a geometric increase (R.474) was found to be non-existent (P.A. 33). The increase in violent incidents appeared to the district court to be on a one-to-one ratio with the increase in population and not due to the double-celling of inmates (P.A. 24).

The district court found that the increase in population at SOCF was directly related to the increase in crime in both the nation and the state (P.A. 10). It was not alleged by the respondents or found by the trial court that the double-celling of inmates at SOCF has been the result of any arbitrary or capricious exercise of judgment on the part of the petitioners or imposed as a means of punishment. Rather, the increase in population was clearly due to a state-wide increase in the number of prison commitments by the sentencing courts (P.A. 13).

SOCF is the only maximum security correctional facility operated by the State of Ohio (P.A. 9). The inmates at SOCF are there because they have been classified as maximum security prisoners. The district court reviewed the classification regulations and found them adequate (P.A. 15). No evidence was presented to the court below that would sustain a finding that the population to cell ratio at SOCF was out of proportion to that of other correctional facilities in Ohio.

On June 29, 1977, and by amendment on July 1, 1977, the district court filed its findings of fact and conclusions of law in which it concluded "on balance" that double-celling at SOCF was unconstitutional (P.A. 34, 38) and directed

petitioners to formulate, propose, and carry out a plan to eliminate double-celling at SOCF. On October 4, 1977, petitioners were allowed an extension for filing the proposed plan until November 14, 1977. Petitioners filed a petition for leave to file an interlocutory appeal which was granted by the district court and later denied by the court of appeals.

On February 16, 1978, the case was assigned for an evidentiary hearing on the plans proposed by petitioners, respondents' objections thereto, and respondents' request for an incremental reduction order. The matter was heard on March 7, 1978. At that time petitioners orally asked for a reconsideration of the court's earlier conclusions of law (R. 1240).

In its memorandum of March 21, 1978 (P.A. 39), followed by the judgment entered on April 7, 1978 (P.A. 42), the district court adopted its prior findings of fact and ordered the petitioners to reduce the population at SOCF from the assigned population of March 21, 1978, by twenty-five (25) persons on or before April 30, 1978, and to continue the reduction at the rate of twenty-five (25) persons every thirty (30) days until the single cell capacity of the institution was reached. On August 25, 1978, the judgment was slightly modified to permit the assignment of 1,645 inmates at SOCF (J.A. 38).

A notice of appeal was filed on May 1, 1978. On July 20, 1978, a motion for stay of execution and expedited hearing was denied by the United States Court of Appeals for the Sixth Circuit. Following this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), the district court, on August 14, 1979, denied petitioners' motion for relief from judgment and stay of execution of judgment (J.A. 40). Thereafter, on November 8, 1979, the court of appeals denied a motion for advancement for hearing, summary reversal and stay of execution by a 2-1 vote (J.A. 44). Following briefing and oral argument on June 2, 1980, the court of appeals affirmed the decision of the district court without opinion on June 6, 1980 (P.A. 2).

On September 2, 1980, a petition for a writ of certiorari was filed with this Court. Following answer by the respondents, the petition was granted on November 3, 1980.

SUMMARY OF ARGUMENT

The district court found that conditions at the Southern Ohio Correctional Facility were unconstitutional. The finding was based on the conclusion that the institution was double-celled; that inmates were not fully employed; that some inmates experienced delays in their educations; and that the number of social workers and psychologists had not increased with the number of inmates assigned to SOCF. These conclusions were reached after the court had decided that the remainder of the respondents many allegations were without merit and in spite of the fact that the court had previously ruled that inmates had no right to privacy, jobs, education or rehabilitation.

None of the conditions found by the district court deprived the respondents of the necessities of life: adequate food, clothing, shelter, sanitation, medical care and personal safety. The inmates were only subjected to minor inconveniences and discomforts by the conditions. The lower courts, therefore, erred in finding that the conditions at SOCF were unconstitutional.

Guidelines should be established within which administrators will be able to control the nation's prisons. These same guidelines are necessary better to define judicial review of prison conditions and to prevent prisoners from litigating any and every combination of minor complaints as constitutional questions.

ARGUMENT

I. THE FINDING

In their second amended complaint (J.A. 14), respondents alleged that they were subjected to cruel and unusual punishment because SOCF was overcrowded in that:

1. The cells at SOCF were designed for single occupancy.
2. Fifty percent (50%) of the prisoners at SOCF were confined in two-man cells.
3. Many prisoners had requested isolated confinement to escape physical and emotional abuse.
4. Respondents Chapman and Jaworski were confined in a two-man cell.
5. The cells measure ten feet six inches by six feet six inches; there was not room for two men to stand in a cell at the same time.
6. The cell blocks were humid and stuffy, smelled and were intolerable and unbearable.
7. Prisoners had no privacy.
8. Day rooms were crowded.
9. Prisoners had to wait to drink water or urinate.
10. Institutional services were barely adequate before the population increased.
11. Medical, dental, psychiatric and social work services were grossly inadequate after the population increase.
12. The available resources were totally inadequate to meet the educational, vocational and counseling needs of the inmates.
13. Work assignments were extremely limited; a substantial percentage of the prisoners lived in forced idleness almost exclusively within the confines of their cells and cell block areas.

14. Extraordinary overcrowding and the lack of meaningful opportunities served to dehabilitate inmates.
15. Treatment and rehabilitation programs were allocated irrationally, capriciously and arbitrarily.
16. Classes of inmates had developed according to their access to opportunities and resources.
17. The conditions at SOCF resulted in episodes of disruptive and anti-social behavior.
18. The guards were unable and unwilling to protect the inmates.
19. A lawless atmosphere existed in the institution.
20. As a result of overcrowding, prisoners were unreasonably and arbitrarily denied parole.
21. The quantity and quality of food was grossly inadequate.
22. Prisoners' access to the law library was restricted; pending litigation was delayed.
23. Visitation facilities were overcrowded.
24. Inadequate training of guards had resulted in the use of unwarranted force, intimidation, and racist procedures and policies.
25. All the prisoners at SOCF suffered as a result of double-celling.

The district court rejected virtually all of respondents' allegations and only found objectionable the practice of double-celling; the watering down of jobs; the delay in education; and the fact that the number of social workers and psychologists had not increased with the population.[2] (P.A. 26).

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[2]It should be noted that while the district court speaks of a social worker and a psychologist, the institution employed six social workers, three psychologists and a part-time psychiatrist. (Plaintiff's Exhibit 12).

Once the district court's decision is stripped of the false premise that any and every conceivable combination of less than desirable conditions is unconstitutional, one issue remains. Does double-celling amount to cruel and unusual punishment? Examination of the record in this case shows an *ad hoc* determination that placing two men in one cell is unconstitutional. The decision in question, if allowed to stand as a precedent, would practically eliminate double-celling at every correctional institution in the country.

Regardless of the circumstances or a prisoner's classification, the district court found all double-celling to be unconstitutional. The court based its conclusion on the following reasons: 1) the inmates are "long-term"; 2) the inmate population, due to double-celling, was greater than design capacity; 3) the average floor space available to each inmate in a double-cell, approximately thirty (30) to thirty-five (35) square feet, was below the standards set by various organizations; 4) double-celled inmates spend most of their time in their cells; and 5) the practice of double-celling was of long-term duration.

These premises are all either necessary and self-evident concomitants of double-celling or they are rather unremarkable indications that inmates are incarcerated for the commission of serious offenses. They are not, in any reasonable sense, factors distinct from double-celling to be considered in analyzing the totality of the circumstances.

A finding that double-celling is unconstitutional, based upon the reasons for the practice and its natural consequences; is a finding that double-celling is *per se* unconstitutional.

II. THE CONSTITUTIONAL STANDARD

This case presents an important issue of constitutional law not specifically addressed by this court - whether the double-celling of convicted maximum security inmates constitutes

cruel and unusual punishment where such practice does not deprive such inmates of the basic necessities of life. It is the petitioners' position that the best test for measuring the constitutionality of a correctional institution is that articulated in *Newman v. State of Alabama,* 559 F. 2d 283 (5th Cir. 1977), *cert. den.,* 438 U.S. 915 (1978);

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration. *Newman,* at 291.

The same standard was applied in *Wolfish v. Levi,* 573 F. 2d 118, 125 (2nd Cir. 1978);

> ...An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety.

The standard was noted by this Court in its review of that decision. *Bell v. Wolfish,* 441 U.S. 520 at 529 n. 11 (1979).

The district court's finding that double-celling at SOCF was unconstitutional is contrary to this Court's holding in *Bell v. Wolfish, supra,* where Mr. Justice Rehnquist, writing for the majority, stated at 542:

> We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the due process clause of the Fifth Amendment.

That holding is the central premise of petitioners' position and is equally applicable to a case presenting an Eighth Amendment issue. To be sure, this Court's decision in *Bell* related to pre-trial detainees and turned on the question of whether or not the practice amounted to punishment. It would be incongruous however, that conditions which were not "punishment" for presumably innocent defendants blossom into cruel and unusual punishment for convicted maximum security prisoners. That which is a lawful limitation on the freedom of pre-trial detainees should also be lawful as to convicted felons.

Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), this court in *Bell* stated the criteria necessary to establish that a practice is punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. *Bell*, at 537-538.

Double-bunking of prison inmates is established both historically and in other prison systems and the practice has its analogies in the military, schools, colleges, and the home. Moreover, the practice of double-celling at SOCF was instituted solely because of an increase in the number of people sentenced to prison requiring confinement in a

maximum security setting. No inmate at SOCF was double-celled as further punishment for his crime or as punishment for violation of an institutional rule. No expressed intent to punish was alleged by the respondents, nor was it alleged that the decision to double-cell any individual was arbitrary or purposeless. Ohio prison administrators were simply charged with the custody of more than 1620 maximum security prisoners and had no other adequate facilities in which to house them. The fact that such a practice may be less than ideal in no way converts the practice into cruel and unusual punishment. Not every disability or discomfort constitutes punishment. *Bell, supra,* at 540.

Petitioners interpret this Court's statement in *Bell* that confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time might raise serious due process questions to mean that an affirmative showing of deprivation of constitutionality mandated rights must be made. No such finding was made in this case.

Although this Court has decided several cases involving the concept of cruel and unusual punishment in the context of sentencing, little has been specifically decided in the context of prison conditions.[3] In *Estelle v. Gamble,* 429 U.S. 97 (1976), this Court decided that deliberate indifference to a serious medical need was cruel and unusual punishment. Similarly, in *Hutto v. Finney,* 437 U.S. 678 (1978), this Court ratified the relief ordered in dealing with isolation cells. By all accounts, SOCF is a modern institution built with support facilities able to handle a population well in excess of 1645.

---

[3]This court had dealt with many prison cases. *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977); *Bounds v. Smith,* 430 U.S. 817 (1977); *Meachum v. Fano,* 427 U.S. 215 (1976); *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Pell v. Procunier,* 417 U.S. 817 (1974); *Procunier v. Martinez,* 416 U.S. 396 (1974). These decisions involved questions of First Amendment or procedural due process rights of prisoners related to various institutional practices.

SOCF is not, and was not, "a dark and evil world completely alien to the free world", *Hutto v. Finney, supra,* at 681, nor was it the unsanitary, vermin infested, ancient, deteriorating dungeon pictured in most prison cases decided by other courts.

The decisions of the courts below are in direct conflict with all other circuits which have addressed the issue. At least four other circuits have found the double-celling of convicted prison inmates to be constitutionally permissible. *Newman v. Alabama, supra; Wolfish v. Levi, supra; Detainees of Brooklyn H. of Det. for Men v. Malcolm,* 520 F. 2d 392 (2nd Cir. 1975); *Crowe v. Leeke,* 540 F. 2d 740 (4th Cir. 1976); *Hite v. Leeke,* 564 F. 2d 670 (4th Cir. 1977); *Burks v. Walsh,* 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd sub nom., Burks v. Teasdale,* 603 F. 2d 59 (8th Cir. 1979).

In *Crowe v. Leeke, supra,* it was held that confining three protective custody inmates, men confined all but a few hours a week, in sixty-three (63) square foot cells with only two beds did not amount to cruel and unusual punishment. The court recognized that the number of inmates assigned to a cell is a matter best left to the sound discretion of prison administrators, i.e., those in the best position to balance prisoners' rights against the state's responsibility for security and order.

Similarly, in *Burks v. Teasdale, supra,* a decision allowing the practice of double-celling was affirmed. A comparison to this case is important. The district court in *Burks v. Walsh, supra,* at 485-487, has found that sanitation was somewhat lacking in shower areas, that food service areas were only reasonably clean, that improvements were needed in the area of pest control, that the institution was old and sometimes noisy, that temperatures were uncomfortable due to an antiquated ventilation system, that broken windows were repaired only on an annual basis, that the dining room was not too crowded, that excessive idleness and tension were evident, and that additional supervisory personnel were

needed. Yet even with these deficiencies, conditions absent in this case, double-celling on a twenty-four hour per day basis, of administrative isolation inmates, for periods of up to four years, was permitted.

In *Hite v. Leeke, supra,* it was held that double-celling alone failed to state a claim for relief under 42 U.S.C. §1983. This decision is of particular importance because the cells are similar to the cells at SOCF, the institution involved was approximately the same age as SOCF and the inmates were permitted slightly less time outside their cells. That court held at 673-674:

> ...This means that the only claim on which plaintiffs can assert a right to relief turns on whether double occupancy of the prison cells constitutes cruel and unusual punishment.
>
> The plaintiffs contend that the dual assignment of two prisoners to a room sixty-five feet square in this prison is *per se* unconstitutional. As we have already pointed out, this assignment to cells is only at night between the hours of 8 p.m. and 6 a.m.; at all other times, the prisoners enjoy a wide freedom of movement and ample opportunity for exercise and recreation. Nor is overcrowding a part of a larger problem of unsanitary conditions or of a pervasive air of physical danger, giving rise to what has been described as the "totality of conditions approach" in this context. *See, ibid.* 12 *Harv. Civ. Rights -Civ. Liberties L. Rev.* at 372; *Costeilo v. Wainwright* (M.D. Fla. 1975), 397 F. Supp. 20, 32, *aff'd* 525 F. 2d 1239, *rehearing en banc granted* 5 Cir., 528 F. 2d 1381, *rev. and remanded on other grounds,* 5 Cir., 539 F. 2d 547 (1976); and *Pugh v. Locke, supra.* The plaintiffs conceded during oral argument that they knew of no case, and neither do we, that holds dual assignment of prison inmates

> alone to constitute "cruel and unusual punishment." They do cite certain cases from the Second Circuit that, because of their special circumstances, it was found to be a violation of constitutional rights to confine two pretrial detainees in a single cell. *Ambrose v. Malcolm*, (S.D. N.Y. 1976), 414 F. Supp. 485; *Detainees of Brooklyn H. of Det. for Men v. Malcolm*, (2d Cir. 1975), 520 F. 2d 392. In the latter case, however, the Court was careful to emphasize that its ruling was strictly confined to pretrial detainees and was without application to convicted prisoners.

and at 674-675:

> So far as convicted prisoners are concerned, we have recently held specifically that the assignment of three prison inmates to a cell about the size of those with which we are concerned did not amount to "cruel and unusual punishment." *Crowe v. Leeke* (4th Cir. 1976), 540 F. 2d 740. The Court in that case emphasized that there was no contention there, just as there is not here, that the prisoners had been "subjected to mental abuse or corporal punishment;* * deprived of the basic implements of personal hygiene; * * * [or] that his cell failed to meet reasonable sanitary standards." The petitioner's complaint-similar to that here - was simply that the assignment of three prisoners, confined in maximum security, to a cell was *per se* unconstitutional. Finding that there was no indication "that the overcrowding has resulted from an 'arbitrary or capricious' exercise of judgment by prison officials," the number of inmates, who may be safely assigned to a cell is a matter resting within the sound discretion of the

> prison administration, and the claim of cruel and unusual punishment was dismissed. Similarly in this case, it is clear that the defendants have not acted arbitrarily or capriciously in their assignments of inmates nor have they, in their dual assignments, been "the cause of deplorable or inhumane conditions." The decision in *Crowe* would appear conclusive on the issue of dual assignment of inmates in this case. (Footnotes omitted.)

The same court has also found an institution unconstitutionally overcrowded where the conditions created deprivations and disadvantages to the inmate population. In *Johnson v. Levine,* 588 F. 2d 1378 (4th Cir. 1978), the court dealt with a breakdown in the maintenance of sanitation, a high level of violence, overtaxed medical facilities and staff, an overburdened food service as well as double-celling and limited opportunities for recreation and instruction.

In the above cited decisions, the courts have taken the position, advanced by petitioners, that the right to relief turns not on the practice of double-celling itself but whether that practice is part of a larger problem of unsanitary conditions, violence, or lack of food, clothing, shelter and medical care; those things that are the basic necessities of life.

As previously indicated, the district court found a watering down of jobs, a delay in education, and a less than desirable level of psychological and social work staff. What the district court did not find was that these deficiencies presented a threat to the lives and health of the inmates. The Constitution simply does not guarantee full employment, immediate education, or rehabilitative services. In fact, the district court reached that exact conclusion in an earlier decision in this case:

Plaintiffs' sixth cause of action is that the defendants, by selecting a limited number of individual inmates to participate in the work, vocational, educational and other opportunities and programs, have violated the equal protection clause of the fourteenth amendment of the United States Constitution.

The problem, of course, with plaintiffs' contention is that a prisoner has no constitutional right to work or be educated while in prison. *Cradle v. Superintendent,* 370 F. Supp. 79 (W.D. Va. 1974). The plaintiffs' contention, in essence, is that if a state undertakes to provide any rehabilitative services, it must provide such services to all inmates. However, as there are no constitutional duties imposed on any governmental entity to educate or rehabilitate a prisoner, this Court believes that efforts to rehabilitate and educate are to be commended and that requiring every prisoner to be treated exactly alike might discourage rather than encourage such programs. *McLamore v. State,* 257 S.C. 413, 186 S.E. 2d 250 (1972). This Court believes that a constitutional issue is raised only if an inmate's work assignment is decided arbitrarily or capriciously. *Beatham v. Manson,* 367 F. Supp. 783 (D. Conn. 1973). Such an allegation is not present in this record.

Plaintiffs claim in their seventh and ninth causes of action that the defendants have failed to provide them with a reasonable opportunity for rehabilitation and that the present conditions at the Southern Ohio Correctional Facility are such as to increase the likelihood that they will not be rehabilitated or successfully integrated into society in violation of the cruel and unusual punishment provisions of the eighth amendment and due

> process provision of the fourteenth amendment. While rehabilitation is certainly an important goal of an institution of confinement, thisCourt has been unable to find a single case holding that there is a general constitutional right to rehabilitation. (J.A. 11).

In ultimately abandoning its above quoted earlier decision, the district court focused on current standards promulgated by professional organizations respecting the desired size of prison cells and institutions (P.A. 36). This Court in *Bell,* however, held that constitutional rights are not coextensive with or determined by such constantly changing, increasing and somewhat utopian standards. *Bell, supra,* at 543, n. 27. Prison administrators are limited by the reality of budgetary constraints and already existing physical facilities. *Bell* simply indicates that the Constitution forbids the deprivation of the basic necessities of life and health. While the district court found a watering down of jobs, a delay in education and less than desirable access to psychologists and social workers, such "rights" are not of the dimension basic to sustain life. In reaching its decision, the appellate court misapplied *Bell* and failed to heed the admonition of this court in *Procunier v. Martinez,* 416 U.S. 396 (1974), that prison administration is best left to prison administrators:

> ... courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. *Procunier,* at 405.

III. RELIEF ORDERED

Petitioners are not seeking a reversal on the separate question of whether or not the relief ordered by the district court was appropriate to the circumstances. Instead, petitioners have challenged the finding of liability itself. The relief ordered, however, underscores that the finding of

liability is based on what is desirable and not on what is constitutionally required. For example, if the number of social workers and psychologists was inadequate, or if work and educational opportunities were deficient, the court could have ordered remedial measures in those areas. Moreover, if the amount of time inmates were allowed out of their cells was inadequate, the district court could have ordered an increase. Instead, without making any differentiation as to which inmates were being double-celled and under what circumstances, the district court simply ordered the elimination of the practice. In doing so, the district court focused solely on the number of men housed in the institution compared to the number it decided the institution was designed to house.

If the court had adopted petitioners' first compliance plan (J.A. 28), those inmates confined in their cells for most of the time would have been single-celled; and those inmates free to move about the institution for fifteen (15) hours each day would have remained double-celled. The district court was aware that this plan had been implemented at the time the final judgment was entered (P.A. 40; R. 1150, 1229, 1235). Instead, the district court chose a remedy that effectively destroyed a classification system it had apparently found to be adequate (P.A. 15) and in the final analysis, the court's remedy also failed to end double-celling at SOCF.

IV. CONCLUSION

In the last decade, prison litigation has flourished, resulting in a variety of conflicting decisions as to what is necessary to provide prisoners with minimum constitutional standards. In an era of increasing numbers of people being committed to correctional systems with limited resources, the area of greatest concern is the ability of the systems to adequately house the growing number of inmates. Petitioners seek a clear statement from this Court defining the parameters in which prison officials may utilize existing facilities to fulfill their responsibilities.

The result reached in the courts below, limiting prison population to original design capacity, regardless of the fact that inmates were not denied any of the necessities of life will have a wide-ranging impact on all corrections systems. To set firm guidelines for future decision making, this Court should distinguish that which is constitutionally required from that which may be deemed desirable by prison reformers or by prison administrators themselves. The Eighth Amendment prohibition against cruel and unusual punishment was not intended to remove all control from prison officials in the day to day operation of their institutions. Here the petitioners provided the inmates under their care with all the things necessary to maintain health and safety.

Allowing the decision of the courts below to stand is tantamount to establishing perfection as the minimum standard of constitutionality. The district court and the court of appeals have held that double-celling, coupled with minor inconveniences and discomforts in areas having nothing to do with the health and safety of the inmates is unconstitutional. No finding was made by either court that the inconveniences and discomforts, by themselves or in combination, were barbarous and shocking. If this decision is allowed to stand, allegations of any and every conceivable combination of prisoner complaints will be raised to the level of constitutional questions.

The decision of the court below should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief Of Petitioners have been served on respondents, Kelly Chapman, #122-531, P.O. Box 45699, Lucasville, Ohio, 45699 and Richard Jaworski, #734304, River Junction Correctional Institution, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210, Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215, Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio, 44113, and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio, 43201, by United States mail, postage prepaid, this day of , 1980. I further certify that all parties required to be served have been so served.

ALLEN P. ADLER
Assistant Attorney General

No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, ET AL., *Petitioners,*

v.

KELLY CHAPMAN, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS

LOUIS A. JACOBS
Counsel of Record

Ohio State University College of Law
1659 North High Street
Columbus, Ohio 43210

JEAN P. KAMP
Legal Aid Society of Columbus
40 West Gay Street
Columbus, Ohio 43215

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113

BRUCE A. CAMPBELL
ELINOR ALGER
American Civil Liberties Union of Ohio Foundation, Inc.
360 South Third Street
Columbus, Ohio 43215

ROBERT K. HANDELMAN
186 East Eleventh Avenue
Columbus, Ohio 43201

Counsel for Repondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether The Double Celling Of Prison Inmates In The Conditions Found To Exist At The Southern Ohio Correctional Facility Violates The Eigth Amendment.

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IN THE

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JAMES A. RHODES, ET AL., *Petitioners,*

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KELLY CHAPMAN, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS

DECISIONS BELOW

The record of the affirmance by the United States Court of Appeals for the Sixth Circuit of the judgment of the district court is now set forth at 624 F.2d 1099.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Eighth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and Title 42, Section 1983, United States Code, set forth in the Petitioners' Brief, respondents cite the following constitutional and statutory provisions:

Amendment I, United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 29, Section 2929.11(B)(1)

Terms of imprisonment for felony shall be imposed as follows:

(1) For a felony of the first degree, the minimum term shall be four, five, six or seven years, and the maximum term shall be twenty-five years;

STATEMENT OF THE CASE

The district court based its decision upon a careful review of the totality of conditions at the Southern Ohio Correctional Facility (hereinafter SOCF) and found that the prolonged double celling of two men into a 63 square foot cell, for long periods of time each day, had caused inmates to suffer physical and mental injury, served no penological purpose, and violated standards of civilized decency. The court's thorough opinion was based upon five days of testimony by numerous prison officials, a prison psychologist and psychiatrist, prisoners, and correctional experts, several depositions, 40 exhibits, a view of the prison itself, and concluded with detailed findings of fact and law.

The Respondents accept the statement of the case submitted by Petitioners except for the following errors and omissions:

Prisoners at SOCF are long term. *Chapman* v. *Rhodes*, 434 F. Supp.1007, 1011 (S.D. Ohio 1977). Two-thirds are serving sentences of life or for first degree

felonies, which are punishable by a minimum of four years and a maximum of twenty-five years incarceration. Ohio Revised Code §2929.11(B)(1). The remaining prisoners were held in maximum security custody because of problems of adjustment in other institutions. Tr.1198.[1]

SOCF opened in 1972 and reached its design capacity during 1975. 434 F. Supp. at 1011. At the time of trial in May, 1977, the population of the institution was 38% over design capacity. The trial court thus considered overcrowding and double celling against a "background of relative permanence." *Id.* at 1021.

The cells were designed, built, and rated to house one man. 434 F. Supp. at 1021.

Double celling reduced the square footage of living quarters per inmate to 30-35 square feet per person. When the floor space required for the bunk beds, the toilet, and other furnishings is excluded, there remain less than 24 square feet per inmate of living space. 434 F.Supp. at 1011.

The trial court found that:"At the best a prisoner who is double celled will spend most of his time in the

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[1] Respondents have used the following abbreviations to refer to the record. Tr., Transcript; P.A., Appendix to Petition for Certiorari; J.A., Joint Appendix; Pl. Ex., Plaintiffs' Exhibit (including transcript pages at which it was introduced and admitted).

cell with his cell mate." 434 F. Supp. at 1021.[2] A "substantial number" of double celled prisoners spent "all but six hours a week" in their cell and "another substantial number all but four hours a week" *Id.*

"[A] substantial number of the inmates are victims of some form of emotional or mental disorder." 434 F.Supp. at 1017. Approximately 15% of the inmates could be expected to suffer from schizophrenia, persons particularly prone to violence engendered by close quarters. No classification system for assigning cell mates existed and prisoners had no option with respect to their cell mate. *Id.* Psychological and social services were "substantially denied to a number of inmates due to the double celling." *Id.* at 1016. "Medical staff ha[d] not been increased since the days of single celling. The situation [did], of course, leave much to be desired. . ." *Id.*

". . .[T]here [were] not enough jobs to go around" and "many inmates assigned to jobs work[ed] only an

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[2] Petitioners apparently challenge the court's finding on how much time inmates had out of cell. Under prison regulations relied upon by Petitioners, double celled inmates had the option of being out of their cells for substantial parts of the day. In practice, however, the court found that "the evidence in this case establishes" that such inmates were out of their cells for only ten hours a day. *Id.* at 1013. This finding adopted that calculated by the Petitioners in their proposed findings of fact submitted after the trial. Defendants Proposed Findings of Fact and Conclusions of Law, filed June 10, 1977.

hour or so a day." 434 F. Supp. at 1015. "Double celling. . .obviously interfered with studying." *Id.*

Five alternative plans were submitted by the Petitioners but rejected by the trial court. Two of the plans would have required legislative approval of new construction, but that approval had not been granted. Two of the plans would have required dormitory housing which all witnesses agreed to be inappropriate in a maximum security institution. A plan that would have allowed increased population and provided that all double celled inmates be assigned to out of cell activity was rejected because the court found:"[A]s we have seen, the greater the population, the less meaningful the job and school assignments." P.A. 40. In any event, the plan dealt with only one of the factors relied upon by the court — time out of cell.

The trial court found that a reduction of 25 persons per month would not cause undue hardship. J.A. 35. In fact, the Petitioners reopened the maximum security penitentiary which SOCF was to replace. Tr. 1150-51; *Stewart* v. *Rhodes*, 473 F. Supp. 1185, 1186 (S.D. Ohio 1979).

SUMMARY OF ARGUMENT

"[O]vercrowding in prisons. . . has been universally condemned by penologists." *United States* v. *Bailey,* 444 U.S. 394, 415-16 n.11(1980). "There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal system. This,

however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency." *Id.* at 424 (Blackmun, J., dissenting).

The Southern Ohio Correctional Facility, a maximum security penitentiary, was, at the time of trial, 38% overcrowded with 2,300 prisoners locked into cells designed for 1,620. The trial court considered the extensive double celling, the size of the cells, the length of time in cell, the duration of the sentences being served, the incidence of mental and emotional illness, the idleness, the lack of ameliorative services, and the violence and found a totality which caused "physical and mental injury from long exposure." 434 F. Supp. at 1020. The Petitioners' assertion that the trial court employed a *per se* standard to ban double celling is a misstatement of the decision. The court specifically held "we certainly are not concluding that all double celling in any 60 square foot cell is beyond the ambit." *Id.* at 1021. The judgment from which this appeal is taken did not, in fact, ban all double celling, but rather limited population to 1,645, a number which would allow double celling for temporary reasons. The Court of Appeals ruled, "we do not read the opinion as holding that double celling is unconstitutional under all circumstances." P.A. 2.[3]

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[3] Because the issue in the Petition for Certiorari was framed in terms of the constitutionality of double celling, the Court may wish to consider disposition of the writ as improvidently granted. *See Belcher* v. *Stengel*, 429 U.S. 118 (1976).

Rather than establishing a *per se* rule, the court determined the constitutionality of conditions at SOCF by "ascertaining the 'totality of the circumstances' of the particular case," 434 F.Supp. at 1019, and held:"At this time and on this present record, this Court is not in any position to do aught but conclude and declare that double celling at Lucasville is federally unconstitutional." *Id.* at 1021. Respondents submit that the trial court employed the proper test, and that its findings based on that test are supported by the evidence and should not be disturbed.

The Eighth Amendment bans punishments which transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976). It "proscribes more than physically barbarous punishments." *Id.* To restrict the Eighth Amendment to "the so-called necessities of life" ignores the far more meaningful reach of that Amendment:

> [A] standard of living constructed in terms of so many calories per day, so many hours of recreation, so many cubic yards of space per individual, and so on, misses the central point when we are discussing the individual's feeling of deprivation, however useful it may be in setting minimum levels of consumption for the maintenance of health.

G. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 68 (1958).

If, however, Petitioners' proposed test of minimum necessities as the measure of the scope of the Eighth

Amendment is accepted, conditions at SOCF were properly found to be unconstitutional. The housing of two men in cells which provided 30-35 square feet of living space or less than 24 square feet of walking space per person violated the requirement that a State provide reasonably adequate shelter to those it incarcerates.

Finally, reliance on *Bell* v. *Wolfish*, 441 U.S. 520 (1979), is misplaced by Petitioners. That decision is not only distinguishable on both its facts and law, but it is also supportive of the decisions by the courts below.

In sum, whether a totality of conditions or minimum necessities standard is used, the overcrowding and double celling at SOCF violate the Eighth Amendment, and the decisions of the district and appellate courts should be affirmed.

ARGUMENT

I Conditions At SOCF Caused Mental And Physical Injury

Petitioners have not challenged the findings of fact made by the trial court. Five factors were emphasized, and these factors amply support the court's ultimate finding of cruel and unusual punishment.

The first factor was that the long term sentences being served by SOCF inmates "accent[ed] the problems of close confinement and overcrowding." 434 F. Supp. at 1020. "Sixty-seven per cent of the inmates were serving either life or first degree felony sentences." *Id.* at 1011.

The rest were at SOCF due to problems with adjustment to prison life. Tr. 1198. These factors focus on the maximum security nature of SOCF. "Maximum security prisons by their very nature and social purpose result in extremely high levels of stress. Confinement is long, involuntary, and unplanned." DeWolfe & DeWolfe, *Impact of Prison Conditions on the Mental Health of Inmates,* 1979 S.III. U.L.J. 497, 520.

The problems of double celling maximum prisoners was described by a former SOCF psychologist:

> Q. How would you compare the effects of double celling at a maximum security institution, specifically SOCF, with a medium security institution or a lesser security institution?
>
> A. Well, you have a different inmate population, for one thing. Most of the inmates there — I wouldn't say most, but at least a large percentage of the inmates there at Lucasville are there because they have been unable to cope with the inner personal situations, you know, in the structure of other institutions.
>
> When you force these people close together, its more difficult I think for them to deal with that kind of a situation than it is with the inmates someplace else, say at the [medium security institutions], who haven't directly manifested such an inability to keep with inner personal living, you know, with proximity of other people. Tr. 460-461.

These problems are exacerbated by the fact "that a substantial number of the inmates are victims of some form of emotional or mental disorder." 434 F.Supp. at 1017. "[I]n a maximum security prison of any size some 15% of the inmates may be expected to be schizophrenic and that that type is particularly prone to violence engendered by 'close quarters' and 'frustrations'." *Id.* at 1017. One incident illustrates this point:

> At approximately 11:55 A.M. on the above date, while I, Officer M. Ticer was working K-4 block (voluntary idle), I observed Inmate Howard put a typewriter and a brown paper bag outside of cell 14. Inmate Howard then came up the range carrying a housecoat over his arm and his night lamp in his hand. When asked what he was doing he stated, "that stuff on the range is my celly's. I have moved him out, he is not to come back in my cell for any reason. Those are orders from above. . ."
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> Pl. Ex. 30 (unpaginated)(4-22-76) Tr. 17, 18.

Dr. Lindner, an expert psychiatrist who was employed as Director of the Receiving Unit of Lima State Hospital for the Criminally Insane, explained at trial what schizophrenia means for double celling in a maximum security context:

> A schizophrenic individual has a tendency to distort perceptions in such a way that the activities of other persons are frequently perceived as threatening, even when they are not intended as such. As a result he is very likely to feel threatened by another individual in the same confined space with him and is much

> more likely to act out towards this individual in a mistaken feeling that he must protect himself. Tr. 432

SOCF was particularly affected because transfers from Lima State Hospital were accepted and given no separate treatment, but rather assigned cells routinely with other inmates. Jago Dep., Vol. 2, 182-83. A former SOCF psychologist described the impact of this practice:

> Many were fearful of being housed together in a cell with someone who had just recently been returned from Lima State Hospital. They didn't understand some of the bizarre behavior they observed Tr. 457.

The very nature of the inmate population at SOCF and all maximum security institutions aggravates the problems caused by double celling. Maximum security prisons contain the "assaultive, aggressive, and psychopathic." J. Bennett, *Of Prisons and Justice* 172 (1974). When such inmates are "[c]rowded into a small area with men who have long records of physical assaults, thievery, and so on (and who may be expected to continue in the path of deviant social behavior in the future)," the conditions produce violence. G. Sykes & S. Messinger, "The Inmate Social System," in L. Orland, *Justice Punishment, Treatment: The Corrections Process*, 172, 173 (1973).

The trial court found that violent incidents at SOCF increased as the inmate population increased. 434 F. Supp at 1018. The same increase was found for "[h]omosexuality, enforced and consensual, extortion and criminal activity". *Id.* at 1020. This increase

occurred, of course, in a constant physical space. The court concluded: "It is simply impossible to stamp out crime and violence in a place where one is the most apt to expect it — maximum security prison." *Id.* at 1019-20. The Associate Superintendent for Custody described violence at SOCF to Ohio legislators:

> When an inmate fails to produce either one of these commodities [money or sex], the extortion group will threaten him with bodily harm or force him into homosexual activity with one or possibly all the members of the group. The common expression is "Choose a man or die." Often after these weaker inmates are forced into homosexual activity they are sold to other inmates for money, commissary, etc. Pl. Ex. 2, Tr. 13, 18

Summaries of incidents, prepared for Plaintiffs' Exhibits 28-30, which the court found to bespeak credibility, are replete with examples of violence and "acting out" conduct. Taking just the last week reported prior to trial, there were six reported incidents of force between inmates including an incident where one prisoner hit his cell mate in the mouth, an incident where a prisoner was stabbed in the stomach by two other inmates, and a fight among four prisoners during which one person's head was used to break a window in a day room. Pl. Ex. 29, p. iv, Tr. 17-18. A summary of internal memoranda seeking restricted placement for particular inmates showed inmates being isolated because of sex acts with other inmates, because the administration was unable to provide protection in other parts of the institution, and because individuals were reputed to be

gang leaders engaging in drug traffic, homosexual prostitution, extortion, or assault on other inmates on a contract basis. Pl. Ex. 21, p. i-iii, Tr. 16, 18.

Experts agree that overcrowding and double celling increase aggressiveness and break down normal social behavior. *See e.g.*, R. Kwartler, *Behind Bars: Prisons in America* 8 (Vintage Books ed. 1977). Because "[i]nmates are often emotionally unhealthy individuals," overcrowding can lead to riots. American Correctional Association, *Causes, Preventive Measures, and Methods of Controlling Riots and Disturbances in Correctional Institutions* 63 (1970)(hereinafter "Riots' Causes").

"Both rioting and nonriot resistance occurred more often in maximum-security facilities where inmates were overcrowded and idle." R. Wilsnack, "Explaining Collective Violence in Prisons: Problems and Possibilities," in A. Cohen, G. Cole & R. Bailey, *Prison Violence* 61, 69 (1976).

To reduce violence, there must be a diminution of "the opportunities that enable one inmate to attack another." J. Jacobs, "Prison Violence and Formal Organization," in A. Cohen, *et al., supra,* at 79, 86. One man cells allow homosexuality to be "somewhat controlled or held to a minimum." V. Fox, *Violence Behind Bars* 66 (1956). Mr. Arnold Jago, the Superintendent of SOCF, testified: I'd prefer to have individuals in individual cells . . . Not so much violence. It's easier individual control." Jago Dep., Vol. 2, pg. 17.

The second factor the trial court focused on was the capacity at SOCF. The institution was designed and built to house and serve 1,600 inmates. At the time of trial, it was "holding some 38% more people than the designers and builders intended it to." 434 F. Supp. at 1020. The effect on inmates was pronounced: "Overcrowding necessarily involves excess limitation of general movement as well as physical and mental injury from long exposure." *Id.* The institution's capacity to meaningfully employ or educate inmates was overtaxed, resulting in extensive idleness for inmates and increased time in cell.

The trial court found "that the testimony that there are not enough jobs to go around is credible, as is the testimony to the effect that many inmates assigned to jobs work only an hour or so a day." 434 F. Supp. at 1015 (footnote omitted). At SOCF, job opportunities remained static as the institutional capacity was surpassed. Fifteen inmates were assigned to a job ten had done before. Jago Dep. Vol. 2, p. 85. The opportunity for education had "been substantially delayed since double celling" and "obviously interfered with studying." 434 F. Supp. at 1015. At the time of trial, more than 700 inmates were completely idle. *Id.*

The expert psychiatrist described what idleness means for prisoners:

> The presence of idleness would result in a decrease in opportunities for the inmates to engage in any form of activity which would allow them to sublimate their emotions, that is to displace them

> into socially approved behavior before they result in aggressive outbursts.
>
> Tr. 431.

Two experts relied upon by Petitioners, Texas Corrections Director Estelle and Federal Bureau of Prisons Director Carlson, testified that maximum security prisoners should be engaged in full-time meaningful activity. A psychologist with the Federal Bureau of Prisons called by Petitioners testified:

> The most negative thing about being in prison, I think is idleness. If inmates are not permitted or there is no work for them to do or they are not permitted to work, I think this is probably the most detrimental thing you can do. We try to avoid it every way we can.
>
> Levinson Dep. p.13.

One former SOCF social worker testified about spending hours trying to get prisoners jobs. She explained that jobs were necessary both to help the prisoner keep himself together and as evidence of rehabilitation for the parole board or transfer committee. "And often they would ask me, you know, 'What can I do? You know, I don't want to blow my cool. I don't want to cause problems, you know. Can I get away from my cell mate?'" Tr. 662-63. Both psychological and social work services had "been substantially denied to a number of inmates." 434 F. Supp. at 1016. In two periods, adequate dental care had been denied. *Id.* Medical care also was severely taxed. *Id.*

This absence of jobs, programs, and care caused by overcrowding has a devastating effect on prisoners. "Of

all prison conditions, the most damaging may be the stupefying monotony and boredom of prison life." T. Wicker, *A Time to Die* 106 (Ballentine Books ed. 1976). James V. Bennett has criticized prisons where inmates "remain locked in cells or quarters hour after hour and day after day with nothing to do." J. Bennett, *supra,* at 172. Being locked in cells for over 14 hours a day (including sleeping time) renders prison life "for the most part monotonous and meaningless, and only those with mental and moral stamina can escape the deteriorating and often degenerating effects of the long days, months and years of their incarceration." A. MacCormick, "Adult Correctional Institutions in the United States," in L. Orland, *supra* at 133, 138. This has led to adoption of a "correctional maxim that idleness breeds discontent and disruptive behavior." E. Megargee, "Population Density and Disruptive Behavior in a Prison Setting," in A. Cohen, *et al., supra*, at 135, 139. Absent "interesting and satisfying work" or other outlets, "emotional stability" is threatened. *Riots' Causes* at 11.

The third factor the trial court identified was the amount of space provided per inmate: "double celling reduces the square footage of living quarters per man to something in the neighborhood of 30-35 feet at best." 434 F. Supp at 1021. The actual walking, rather than living, space was less: cells "contain[ed] the following furniture and equipment: one cabinet-type night stand, one wall cabinet, one wall shelf, one wall mounted lavatory with hot and cold running water and steel mirror, one

china commode which is flushed from inside the cell," and a bed three feet by six feet, eight inches. *Id.* at 1011. These reduced floor space to 21-24 square feet per double celled inmate.

Accepted professional standards uniformly rejected 30-35 square feet per inmate. The recently pronounced *Federal Standards for Prisons and Jails,* formulated by the United States Department of Justice, recommended that "All cells and detention rooms rated for single occupancy house only one inmate;" Standard 2.02, and single cells "have, at a minimum, 50 square feet of floor space," Standard 2.03. Long-term facilities where over ten hours a day is spent in a cell must have "at least 80 square feet" of floor space, Standard 2.04, and multiple-occupancy cells or rooms must provide "a minimum of 60 square feet of floor space per inmate." Standard 2.05. The Commission on Accreditation for Corrections requires in its *Manual of Standards for Adult Correctional Institutions* that there be "one inmate per room or cell, which has a floor area of at least 60 square feet" for inmates locked up ten hours or less and "at least 80 square feet of floor space" for longer confinement. Standard 4142. *Accord*, The American Correctional Institution, "75 square feet is the minimally acceptable standard;" the National Sheriffs Association, 70-80 square feet; the National Council on Crime and Delinquency, not less than 50 square feet floor space, and the United States Army, 55 square feet. 434 F.Supp. at 1021; the American Public Health Association Standards for Health Services in Correctional Institutions (1976)(60

square feet per inmate); The National Clearinghouse for Criminal Justice Planning and Architecture (and, through it, the Law Enforcement Assistance Administration)(70 square feet of individually designated living area); National Advisory Commission on Criminal Justice Standards and Goals (80 square feet per person); the Model Sentencing and Corrections Act, approved by the National Conference of Commissioners on Uniform State Law, 1978 (70 square feet); American Institute of Architects (70 square feet per prisoner); and The Building Officials Conference Code of America Building Code (70 square feet) cited in *Ruiz* v. *Estelle*, No. H-78-987 (S.D. Tex. 1980) (Slip Op., p. 210-211 n. 21).

Further there is no penological justification for double celling. Every prison administrator who testified stated a preference for single celling. (Dr. Adam McQuillan, former warden at Rikers Island, Tr. 48; Texas Corrections Director Estelle, Tr. 513; Federal Bureau of Prisons Director Carlson, Dep. 19; Federal Bureau of Prisons Psychologist Levinson, Dep. 27; former prison official in Kentucky and Ohio Dr. Burns, Dep. 29; former Nebraska and Louisiana warden Maurice Siegler, Dep. 70; and Superintendent of SOCF Jago, Dep., Vol. 2, p.17).

"[T]here is a clear association between restirctions on personal space and the occurrence of disruptive and aggressive behavior." E. Megargee in A. Cohen, *et al., supra,* at 141. One commentator has noted research that "aggressive people required more space rather than less, that when a person comes within *X* number of feet of

them their whole nervous system begins to get excited." W. Nagel in A. Cohen, *et al., supra*, at 146. "Recent scientific studies have shown that marked, demonstrable physiological and psychological damage is done to animals . . . overcrowded beyond permissible territorial imperatives." R. Goldfarb & L. Singer, *After Conviction* 389 (Touchstone ed. 1973). *Cf.* R. Sommer, *Personal Space: The Behavioral Basis of Design,* (1969); E. Hall, *The Hidden Dimension* (1966); R. Ardrey, *The Territorial Imperative* (1968). By 1980, the American Correctional Association had adopted this view: "In living quarters, the private room with outside window establishes individuality and territory and is considered the best approach." *Riots' Causes* at 58 (emphasis in original).

The fourth factor used by the court was the amount of time spent by inmates locked in their cells with cell mates. "At the best a prisoner who is double celled will spend most of his time in the cell with his cell mate. A substantial number must so spend all but six hours a week and another substantial number all but four hours a week." 434 F. Supp. at 1021. Due to overtaxed facilities, most double celled inmates were out of their cells "some ten hours a day." *Id.* at 1013.

The impact of double celling on prisoners flows not simply from confinement in a small space but rather from the time daily spent in cells and duration of such conditions. Gilbert, *Observations About Recent Correctional Architecture,* 1 Prison J. 7, 11 (1971). *See also,* U.S. Justice Dept., *Federal Standards for Prisons and*

Jails, Standard 2.04 (1980)(longer time in confinement, more space is necessary); Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions,* Standard 4142 (same). Lock-up of over 14 hours a day, including sleeping time, has a deteriorative effect on inmates' health. A. MacCormick, *supra*, at 138.

Even Petitioners' expert, Texas Corrections Director Estelle, was emphatic about the harmful impact of long-term confinement of two men at SOCF in cells designed for single occupancy:

> Q. . . . Would it be your opinion that those same cells, if they housed men for 23 hours a day, with all their personal belongings would be adequate?
>
> A. For over a prolonged period of time, under those circumstances, that would not be adequate. Tr. 566

Accord, Ohio Corrections Director Denton, Tr. 1053.

Extensive time in cell for long periods was particularly harmful because at SOCF double celling was done without classification or choice. One expert testified:

> And doubling two people that may not get along, may hate one another, into one facility and without giving them a chance to study if he is so inclined, to read, to engage in some kind of hobby, to just be in a cell, to have a little solitude for himself, to have a little place where he can go and think things over, is not my idea of getting ready for parole

> board or getting ready to go out in free society as a better person.
>
> Tr. 56.

The former SOCF psychologist explained the impact of double celling in a small space:

> Well, mostly what was called to my attention was the privacy in terms of sexual behavior. You have an inmate who is, you know, closed awaP from any type of normal sexual outlet and you are not even providing him with the opportunity to masturbate in privacy. It's a situation where, you know, sexual tensions can build up and they can flare up into aggressive behavior.
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> Tr. 465.

Inmates testified about the small grievances which became major problems of life:

> Well, this cellie that I have now, I have nothing against playing a harmonica, but the guy don't know how to play one and it drives me up the wall; plus he has a habit of clearing his teeth, cleaning them, whatever; I mean clicking sound. And that's a continuous thing. And in the evening when you are trying to sleep he is doing setups in the bed. It's just little things that irritate a man.
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> Tr. 196.

The final factor distinguished by the trial court was the "relative permanence" of the double celling and overcrowding at SOCF. 434 F. Supp. at 1021. The court held that "[d]ouble celling in 60-foot cells is undoubtedly

permissible as a temporary measure, but we deal not with anything temporary here." *Id.*

The court noted that beginning in 1975, prison populations rose faster than available housing units. The Director of the Department warned the state legislature repeatedly of the problem, stating in his annual report for 1976: "Ohio's existing prison system is simply not equipped to handle the population growth projected for the rest of the 1970s . . . Only the construction of several new correctional facilities will enable Ohio's prison system to provide sufficient housing for the anticipated growth in the inmate population." Pl. Ex. 17, p. 7-8, Tr. 15, 18. Without such new construction, or the intervention of the district court, double celling would continue to increase. Jago Dep. Vol. 2, p.70.

When double celling and overcrowding combine for month after month "[t]he most obvious consequences are high tension, inmate anger, rampant violence, and homosexuality. What may not be obvious, but is in subtle ways more damaging, is every inmate's consequent loss of dignity, privacy and status as a separate and individual man or woman." T. Wicker, *supra,* at 109. These permanent conditions of custody "involve profound attacks on the prisoner's self-image or sense of personal worth, and these psychological pains may be far more threatening than physical maltreatment." G. Sykes & S. Messinger, *supra*, at 172. With double celling in an overcrowded institution "privacy and human dignity are relentlessly sacrificed." W. Nagel, *The New Red Barn: A Critical Look at the Modern American Prison* 66 (1973).

As the American Correctional Association has noted, "[t]hat man is responsive to his physical environment is clearly recognized and demonstrated in the social sciences field." *Riots' Causes* at 49. Long term doubling up of cells designed for one prisoner and other overcrowding have been root causes of riots. J. Bennett, *supra*, at 171 (Jackson, Mich.); T. Wicker, *supra*, at 6 (Attica, N.Y.); V. Fox, *supra*, at 304-06 (Jackson, Mich.); *The Economist* 31 (Feb. 9, 1980)(Santa Fe, N.M.); Serrill & Katel, "The Anatomy of a Riot," *Corrections* 7 (Apr. 1980) (Santa Fe, N.M.). In the New Mexico riot, which left 33 inmates dead and 200 others beaten and raped, negotiation narrowed inmate demands to five, one of which was an end to double bunking in a cell block. *Id.* at 20.

II The Trial Court Utilized The Correct Test Of Totality Of Circumstances

The test employed by the trial court and affirmed by the Sixth Circuit for determination of the constitutionality of conditions at SOCF was whether the totality of conditions violated the Eighth Amendment. This is the test that was approved in *Hutto* v. *Finney*, 437 U.S. 678 (1978), where the trial court's imposition of a thirty day limit for confinement in segregation cells in the Arkansas prison was affirmed. In this case, Petitioners have assected that the trial court established a *per se* rule banning double celling, despite the court's explicit reliance on the totality of conditions test and the unanimous decision of the Sixth Circuit that the *per se*

test had not been used. The court did not find that any double celling for any period of time in any size cell is unconstitutional, but only that double celling of long term prisoners in 63 square foot cells for fourteen or more hours a day in a maximum security prison and under the conditions existing at SOCF was unconstitutional. No *per se* rule was adopted by the court. Respondents did "not claim that double celling is per se unconstitutional." 434 F. Supp. at 1009. The court analyzed precedent on double celling and noted conditions present or absent at bar. *Id.* at 1019. Finally, the court explicitly declined to rule that double celling was *per se* unconstitutional. *Id.* at 1021.

Just as the effort by the Arkansas Petitioners in *Hutto* v. *Finney* to construct a *per se* rule and then challenge it in this Court was rejected, so should Petitioners' effort here to mischaracterize the holding be rejected. Although there may be institutions where double celling could be so severe as to be unconstitutional *per se*, the combination of the extent of overcrowding, double celling, size of cell, length of time in cell, length of sentence, incidence of mental and emotional disturbance, idleness, lack of ameliorative services, and violence found by the trial court demonstrates that no *per se* holding was made here.

The totality test applied in *Hutto* includes more than the physical necessities of life. The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976).

> The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency, . . ." against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," . . . or which "involve the unnecessary and wanton infliction of pain."

Gamble, 429 U.S. at 102-103 (citations omitted). *Accord, Hutto,* 437 U.S. at 685. "Confinement in a prison or an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Id.*

The totality of conditions test requires the trier of fact to evaluate all of the factors which constitute punishment of the prisoner and to determine whether they cause the unnecessary infliction of suffering or are sufficiently serious to transgress modern concepts of decency. The district court here made detailed findings of fact which supported its conclusion of cruel and unusual punishment, facts which are amply substantiated by the evidence.[4] The findings were based on the interplay of factors: the maximum security nature of the prison and the prisoners, the length of sentences being served, the extent of the overcrowding, the design of the cells being used to house two men, the length of time

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[4] The decision here was based upon detailed findings of fact involving most aspects of the prison. Such findings by a trial judge who heard and saw the evidence should be accepted unless clearly erroneous. *See Hutto,* 437 U.S. at 688.

spent in the cell, the indefinite duration of the double celling, the mental and emotional problems suffered by prisoners, the idleness and lack of services prevalent in the institution, and violence found at SOCF.

In double celling and overcrowding cases, the same factors have been measured under the totality of conditions test to determine whether cruel and unusual punishment has been imposed.

> While no single factor is dispositive, the following considerations can be distilled from these opinions as being significant in determining whether overcrowding constitutes cruel and unusual punishment:(1) the duration of the prisoners' confinement; (2) the degree to which the population exceeds the institutions design capacity; (3) the size of the inmates' quarters and the number of hours per day the inmates must spend in those quarters; (4) the effects of the increased population on the prisoners' mental and physical health; and (5) the relative permanency of the crowded conditions.

Capps v. *Atiyeh,* 495 F. Supp. 802, 814 (D. Ore. 1980). *Accord, Wolfish* v. *Levi,* 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell* v. *Wolfish, supra* (two inmates in a 100-150 square feet cell not *per se* unconstitutional, remanded for determination whether two inmates in a 75 feet cell is unconstitutional); *Johnson* v. *Levine,* 588 F.2d 1378, 1380 (4th Cir. 1978)(*en banc*)(double celling unconstitutional in 44 square feet cell); *Newman* v. *Alabama,* 559 F.2d 283, 288 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978) (double celling unconstitutional under existing conditions but not in

newly constructed prisons); *Burks* v. *Teasdale*, 603 F.2d 59 (8th Cir. 1979)(double celling unconstitutional in 47 square feet cell but acceptable in 65 square feet cell because of generally favorable totality of conditions); *Battle* v. *Anderson*, 564 F.2d 388 (10th Cir. 1977)(double celling unconstitutional in less than 60 square feet.)[5]

The totality of conditions test has been consistently applied by appellate and trial courts and has proved to be a workable tool, which requires extensive factual analysis by the district courts to determine whether confinement at the challenged institution violates the Eighth Amendment. The test properly focuses on the seriousness of the alleged constitutional violation rather than on the deference to administrators' expertise appropriate in other contexts.

In a First Amendment context, for example, focus is on the penal interests asserted to outweigh the inmates' constitutional claim. *See, Jones* v. *North Carolina Prisoners' Union,* 433 U.S. 119, 133 (1977). In that case, the Court weighed the substantiality of the penal interests and impact on them of recognizing the inmates' claim. In an Eighth Amendment context, however, the prison administrators' justification for a cruel and unusual punishment is secondary; instead, focus is on the totality of conditions and impact on inmates. A wooden-handled, five foot long, thick leather strap is no

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[5] Petitioners' assertion that the decision here is in conflict with those in other Circuits is thus incorrect.

less cruel and unusual because it directly furthers the important penal interests of discipline and order. *See Jackson* v. *Bishop*, 404 F.2d 571, 574 (8th Cir. 1968). Indeed, "[m]echanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity . . . "*Spain* v. *Procunier*, 600 F.2d 189, 194 (9th Cir. 1979).

Moreover, the nature of the prison experts' judgment in *North Carolina Prisoners Union* involved conflicting predictions about the dangers of inmate unions. 433 U.S. at 127-28. Here, the expert judgments are in uniform agreement: "single celling is desirable" at SOCF. 434 F. Supp. at 1016. As the court found, it was "the contemplation of officialdom that the facility would, during its useful life, not be called on to house more than 1,600 or 1,700 people and that would be in single cells." *Id.* at 1010.

In fact, the only reason Ohio prison administrators double celled at SOCF was lack of funds. Despite intense lobbying efforts, the administrators were forced to go against their best judgment and act contrary to the SOCF design. But,"[i]t is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (citations omitted). The principle was reiterated in *Campbell* v. *Cauthron*, 623 F.2d 503, 508 (8th Cir. 1980):

> One further matter deserves consideration in connection with the cell space and exercise facilities in the jail. The district court appears to have placed

> undue emphasis on the cost of relieving overcrowding and providing exercise opportunities. The court stated, "*[I]n light of the tax money available*, the nature of the court house structure, and all other factors, the physical plant is adequate" . . . As we have previously made clear, if states or counties operate detention facilities, they must meet constitutional standards. (Citations omitted, emphasis in original).

If Ohio is to operate a prison system, it must commit the funds to do so constitutionally. *Pugh* v. *Locke* 406 F. Supp. 318, 330-31 (M.D. Ala. 1976) (history omitted): "[A] state is not at liberty to afford its citizens only those constitutional rights which fit comfortably within its budget." Unless deference is to have a talismanic quality, the overcrowding and consequent double celling at SOCF cannot be justified by reference to prison administrators' informed discretion.

The Sixth Circuit found that "[t]he district court listed in its opinion a number of considerations upon which it based its finding that double celling at the particular prison in question is unconstitutional." at P.A.2. That application of the totality of conditions test should be affirmed.

III. Even Under The "Minimum Necessities" Test, Double Celling At SOCF Violates The Eighth Amendment

Petitioners and their amici have urged this Court to limit the protection of the Eighth Amendment for prisoners to adequate food, clothing, shelter, sanitation,

health care and personal safety. Respondents agree that the Eighth Amendment *at a minimum* requires prison officials to provide each inmate with adequate food, clothing, shelter, sanitation, health care and personal safety. But Respondents urge this Court to reject such a simplistic and primitive concept of the full reach of the Eighth Amendment.

This "minimum necessities" test has no precedential support in this Court. *See Estelle,* 429 U.S. at 102-103; *Hutto,* 437 U.S. at 668. Instead, the "totality of conditions" test has been adopted by this Court and effectuates the Eighth Amendment's evolving standards of decency.

Even under the minimum necessities test suggested by Petitioners, however, double celling at SOCF is unconstitutional. Confining two prisoners for a majority of the day into a cell measuring approximately 65 square feet constitutes inadequate shelter. Contrary to the argument of Petitioners, the Eighth Amendment's requirement of adequate shelter means more than a roof over one's head. It is simply too late in the day for such a restrictive interpretation. "[A] state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well being." *Ramos* v. *Lamm*, No. 79-2324 (10th Cir., Oct 2, 1980)(Slip Op. at 21).

Surely there exists a square footage too small for confinement of a human being. In the instant case, the trial court found that 30-35 square feet of living and

21-24 square feet of walking space was inadequate under the conditions and due to the nature of SOCF.[6] That finding is supported by the following:

(a) SOCF was designed and built by Ohio officials to house one man per cell and accordingly give 63-68 square feet per person. This design showed the will of the people of Ohio as reflected by the Ohio Legislature's approving the SOCF plans. *Cf. Gregg* v. *Georgia*, 428 U.S. 153, 175-76 (1976)(public attitude indicates contemporary value).

(b) All the experts support single celling.

(c) Professional organizations agree that 30-34 square feet is inadequate.[7]

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[6] In *Ruiz* v. *Estelle, supra*, referred to by the State of Texas in its amicus brief, the trial court found double celling in 45 square foot cells to be *per se* unconstitutional. Slip Op. at 190. The court was clearly shocked that prison administrators had not stopped with double celling, but succumbing to population pressures had on occasion tripled and quadrupled inmates in those cells. *Id.* at 8. The Petitioners here have never asserted that they would stop at double celling. Superintendent Jago, asked about ways to handle continued population pressure, testified that they will cross that bridge when they come to it. Jago Dep. Vol 2, p.70.

[7] In an Eighth Amendment case, "contemporary standards of decency" may be manifested by "[m]odel correctional legislation and proposed minimum standards." *Estelle,* 429 U.S. at 103 n.8. In a due process case, however, they do "not establish constitutional minima." *Wolfish*, 441 U.S. at 544 n. 27. At the least, however, the standards are "a factor to be considered in determining

(d) Modern science teaches that territoriality is a basic human need.

(e) Thirty or thirty-five square feet is a very small space, about the size of a large conference table, a small bathroom or a queen size bed.

(f) Confinement in that space occurred for a substantial portion of the day, under maximum security conditions, where inmates were idle and could be psychotic, and violence was a constant threat.

(g) Inmates double celled suffer mental and physical harm.

(h) Other courts have found 50 square feet to be the constitutional minimum for adequate shelter. "No one takes issue with the basic requirement for human decency and this Court holds a failure to achieve that minimal standard contravenes the Eighth Amendment prohibiting cruel and unusual punishment." *Gates* v. *Collier*, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd*, 548 F.2d 1241 (5th Cir. 1977). *Accord, Battle* v. *Anderson, supra,* at 395.

(i) The long duration of confinement increased the harm caused by the limitation of physical space.

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whether contemporary standards of decency have been met." *Ramos, supra,* Slip Op. at 18 n. 10. The difference between a cruel and unusual punishment and due process test is that the former incorporates contemporary values, which require use of empirical standards. *Compare Ballew* v. *Georgia,* 435 U.S. 223, 231-32 n.10 (1978).

The floor space provided to SOCF prisoners was substantially less than the lowest minimum recommended by anyone. The constitutional definition of shelter must require more.

IV The Decision Of The District Court Was Consistent With This Court's Decision In Bell v. Wolfish

In their Brief, Petitioners have relied heavily on the decision in *Bell* v. *Wolfish, supra*, holding that double celling under the conditions existing at the Metropolitan Correctional Center did not constitute punishment. However, as noted in that decision, as held by the district court, and affirmed by the Sixth Circuit, the facts in the instant case are far different from those in *Wolfish*:

> Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions . . . is misplaced . . . see . . . *Chapman* v. *Rhodes,* 434 F. Supp. 1007 (S.D. Ohio 1977) . . . The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases.
>
> 411 U.S. at 544 n. 27

Respondents submit that the reasoning and conclusions of the trial court in this case are consistent with

those in *Bell* v. *Wolfish*. A comparison of the facts of the two cases reveals the factual disparities which support the distinction between the two institutions.

Facts In Wolfish	Facts In Chapman
1. At worst, double celling at MCC lasted a very short time. Fifty per cent (50%) of all inmates at MCC were there less than thirty (30) days, seventy-three per cent (73%) were there less than sixty (60) days. Further, of 389 rooms, only 121 had been designated for double bunking and those actually double bunked never exceeded 73 (less than 15%).	1. Double celling at SOCF had lasted two years prior to trial and was to be a permanent condition for the foreseeable future. Further it was envisioned nearly all inmates at SOCF would be double celled. See note 6, *supra*.
2. MCC was a pre-trial detention facility which also housed misdemeanants.	2. SOCF is Ohio's only maximum security facility. 67% of the inmates at SOCF at the time of trial were either serving life sentences or first degree felony sentences (4-25 years). 75% to to 80% of all the inmates at SOCF

FACTS IN WOLFISH	FACTS IN CHAPMAN
	suffered from some sort of personality disorder, including schizophrenia, paranoia, and depression.
3. Each inmate only spent eight hours a day in his cell with his cell mate. The rest of the time the inmates had access to other space.	3. At best a prisoner at SOCF would be in his cell with his cell mate most of the time. A significant minority of the prison population at SOCF would be in their cells with their cell mates all but six hours a week, and some all but two hours a week.
4. The cells at MCC were designed to house one man per cell. The cells measured 75 square feet.	4. The cells at SOCF were designed to house one man per cell. The cells measure approximately 63 and 68 square feet.
5. The Court found nothing approaching genuine privation and hardship.	5. The court found physical and mental injury suffered by the inmates.
6. The officials at MCC felt that they could accom-	6. All the experts and the officials at SOCF agreed

FACTS IN WOLFISH	FACTS IN CHAPMAN
modate the double celling fairly well. This Court in *Bell* urged the lower court to give deference to prison officials in their efforts to run prisons. The Court noted that neither lower court had found the conditions so severe as to constitute punishment.	that double celling at SOCF was a bad idea, it served no penological purpose, it hampered rehabilitation and it made internal prison security tough to maintain. The trial court's conclusion gave deference to these opinions.
7. No finding was made that double celling impaired delivery of services.	7. The Court found from the evidence that 80% of the prisoners at SOCF suffered from some sort of personality disorder. The Court also found that as a result of double celling and overcrowding, the prisoners' existing personality disorders were aggravated and that SOCF's psychological and social worker services were substantially denied to the prison population.
8. "Double bunking may have taxed some of the equipment or particular	8. As a result of the overcrowding at SOCF caused by double celling, there ex-

FACTS IN WOLFISH	FACTS IN CHAPMAN
facilities in certain of the common areas . . . " Because of the short term of confinement, programs were not an issue in the case.	isted widespread idleness. The overcrowding delayed school opportunities, diluted existing job opportunities and caused most inmates to be idle all day. Such idleness was decried by all the expert witnesses and prison officials. Further, it was conceded by all that idleness over a long period of time would create real problems for prisoners who were double celled.
9. Violence was not an issue in the case.	9. Although the trial court ruled that violence at SOCF only increased proportionately and not geometrically to the increase in population, the violence in a maximum security penitentiary contributed to the conditions at SOCF.

This conclusion that *Bell* is not inconsistent with decisions banning double celling in prisons similar to SOCF was reached by the three Circuit Courts of Appeals which have considered the issue. *Burks* v. *Teasdale, supra* at 63; *Chapman* v. *Rhodes, supra* at P.A. 2; *Ramos* v. *Lamm, supra* at 8.

CONCLUSION

In 1910, this Court was asked to interpret restrictively the Eighth Amendment's ban on cruel and unusual punishment. *Weems* v. *United States*, 217 U.S. 349, 356 (1910). The Court rejected an interpretation that "would indeed be as easy of application as it would be deficient in efficacy and power." *Id.* at 373.

Since that time, the Court has not retreated from an interpretation of the Eighth Amendment that is consonant with basic human dignity. Instead, the Court has applied "contemporary standards of decency" to Eighth Amendment challenges against prison conditions. *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976). In *Gamble,* the Court held that "deliberate indifference" to the serious needs of prisoners violated the Eighth Amendment. *Id.* at 104.

Now, the Court has before it a case involving such deliberate indifference. Petitioners are asking this Court to license the overcrowding of state prisons despite its harmful effects on both prisoners and prison officials and the cruel consequences uniformly recognized by appellate and district courts. When overcrowding contributes to a totality of conditions that inflict harm and

there is no countervailing security or other legitimate justification, courts must intervene. When minimum shelter is not provided and the only defense is lack of funds, courts must intervene.

The Court recognized back in 1910 that "[r]ights declared in words might be lost in reality." *Weems*, 217 U.S. at 373. In America, the reality is that prisons have been a national disgrace. States have abdicated their constitutional responsibility, and federal courts have been forced in the past decade to intervene. Federal courts must continue to "discharge their duty to protect constitutional rights," and no "policy of judicial restraint [can] encompass any failure to take cognizance of valid constitutional claims" arising in America's prisons. *Procunier* v. *Martinez*, 416 U.S. 396, 405-406 (1974).

Prisoners across the country look to this Court for a signal. Will the Eighth Amendment remain a vehicle that the lower courts can use to address the inhumane treatment of prisoners or is the legal avenue of redress to be foreclosed by a restrictive interpretation of that Amendment? The signal must be that a viable remedy exists. The lower courts should be affirmed.

Respectfully submitted,

LOUIS A. JACOBS
Counsel of Record
Ohio State University College of Law
1659 North High Street
Columbus, Ohio 33210
(614) 422-6821

JEAN P. KAMP
Legal Aid Society of Columbus
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

CHRISTOPHER D. STANLEY
611 Rockefeller Building
Cleveland, Ohio 44113
(216) 771-0811

BRUCE A. CAMPBELL
ELINOR ALGER
American Civil Liberites Union of
Ohio Foundation, Inc.
360 South Third Street
Columbus, Ohio 43215
(614) 228-8952

ROBERT K. HANDELMAN
186 East Eleventh Avenue
Columbus, Ohio 43201
(614) 294-1636

Counsel for Respondents

NO. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES A. RHODES et al.,
Petitioners,

vs.

KELLY CHAPMAN et al.,
Respondents

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR PETITIONERS

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ARGUMENT

I. Standards of Civilized Decency

Respondents, in their brief at page 6, footnote 3, assert that because the question in this case is phrased in terms of the constitutionality of double-celling, this Court may want to consider whether its grant of certiorari was improvident. Such a suggestion is without merit because the district court precisely made double-celling the focus of its decision:

> It is our conclusion overly and on balance that the double celling at Lucasville is unconstitutional. (P.A.34)

The district court failed to distinguish double-celling from overcrowding. A single celled institution may be overcrowded and, conversely, a double-celled facility may not be. The district court equated what it found to be the design capacity of the institution with the ~~minimum~~ maximum constitutionally permitted population.

Respondents suggest that this case did not involve the issue of double-celling as an isolated practice, but only as an incident of the larger issue of overcrowding. While thus denying that the district court found double-celling to be *per se* unconstitutional, the respondents argue that the practice violates "standards of civilized decency". Considering that few prisons can meet the space requirements demanded by respondents, *per se* is an apt description of the district court's holding.

Single celling may be a desirable goal; however, what is desirable and preferable is not constitutionally mandated under the Eighth Amendment. The ban on cruel and unusual punishment is certainly not a proscription of all but the optimum conditions. As stated by Justice Blackman in his dissent in *United States v. Bailey*, 444 U.S. 594, 424 (1980):

> This however does not excuse the failure to provide a place of confinement that meets *minimal* standards of safety and decency (emphasis added).

This is the position the petitioners have maintained throughout and is consistent with the opinion in *Newman v. Alabama*, 559 F. 2d 283 (5th Cir. 1977); *cert. den.* 438 U.S. 915 (1978). See also *Bell v. Wolfish*, 441 U.S. 520, 529 n. 11 (1979).

A comparison of the conditions at S.O.C.F. and the conditions and practices in federal institutions, as evidenced by the memorandum of the United States filed herein, demonstrates that the standards of a civilized society cannot be analytically created in an utopian vacuum. (See also Carlson Deposition pp. 8-13, 26; Levinson Deposition pp. 12, 16, 21, 29, 37). Currently, twenty-nine (29) federal prisons are over design capacity; a substantial number of federal prisoners are provided with less space per man than inmates at S.O.C.F.; and some are multiple-celled on a twenty-three hour per day basis. Multiple- celled inmates in the federal system are also serving long sentences and the practice apparently has continued for some time.

The practice of double and multiple celling by the federal government demonstrates that the use of multiple occupancy living quarters is not uncommon in prisons, nor is it uncommon in other types of institutions and the home. So common a practice can hardly be violative of the standards of civilized decency.

II. Violence, Physical Injury, and Psychological Injury

Throughout their brief, respondents argue that conditions found at S.O.C.F. led to violence, riot, physical injury, and psychological damage. This argument is supported in large part by reference to a number of books and

articles written prior to the trial of this case by persons respondents choose not to call as witnesses. Moreover, no witness called by either party made reference to any of the works cited by the respondents. Respondents desperate reliance on such secondary sources is dictated by the fact that the record of the case simply does not support their claim that the conditions at S.O.C.F. resulted in violence, riot, or physical or psychological injury.

Two inmates, called by respondents, in fact testified their behavior had improved after S.O.C.F. was double celled (R 219-220, 414-415); another respondent inmate testified that he requested a double cell for protection (R 188); and two inmates testified on respondents' behalf they had refused transfers out of S.O.C.F. (R 216, 222, 323). Corrections experts testifying on behalf of the respondents found the institution quiet (R 92) and the population docile (R 1111). Three psychologists testified that they knew of no relationship between double celling and increased violence (R 895-897, 988, 1001-1002; Levinson Deposition pp. 12, 29). The institution's physician had noticed only a small increase in stress related complaints. (R 940).

No increase in the rate of violence was found by the district court. No riot has ever occurred at S.O.C.F.

Respondents attempt to support their argument by relying heavily on the testimony of Dr. Louis Lindner, whom they characterize as an "expert psychiatrist". However, at trial, respondents were careful to qualify Dr. Lindner only as a physician (R 424). Dr. Lindner later claimed to be a psychiatrist but stated that he was neither board certified nor eligible for certification in that specialty (R 436-437). The record is also clear that Dr. Lindner's testimony amounted to little more than a series of guesses. He had never visited S.O.C.F. nor examined an inmate (R 436, 444). He had not studied the effects of crowding

nor had he done any personal research on the subject (R 429). He stated his opinion was based only on what he had read (R 429) but then stated he had not read any books on the effects of crowding (R 443). Even if Dr. Lindner's qualifications were accepted by the district court, his testimony does not support respondents' position. When asked if crowding contributed to a riot at another institution with which he was familiar, his reply was that the connection ". . . would involve a very speculative chain." (R 444). It should also be noted that the district court found no causal connection between the conditions present at S.O.C.F. and the mental status of the inmates.

No objective evidence was offered at trial to show that double-celling had any psychological effect on the population. No finding was made that any inmate had suffered an emotional or mental disorder as a result of double-celling or the increase in population.

Respondents place particular emphasis on the factor of time out of cell. Respondents claim that inmates are allowed out of their cells for only ten (10) hours each day. The district court found however that 75% of the inmates could be out of their cells from 6:30 a.m. to 9:30 p.m. (PA15). Generally, inmates are permitted out of their cells from 6:30 a.m. to 9:30 p.m. (R 159, 836). The figure of 10 hours set out in the proposed findings of fact and conclusions of law was nothing more nor less than an average; i.e. while an inmate is free to leave his cell for fifteen (15) hours each day some do not always take advantage of the opportunity.

Inmates in the most secure classifications were permitted out of their cells on a limited basis for exercise. Inmates classified to administrative isolation (J-1, J-4 and K-4) were single celled and allowed out two (2) hours per week and for visits. Inmates classified as voluntarily idle (J-4, K-4 and K-3) were double-celled and allowed out for four (4) hours per week and visits. Those classified as

protective custody inmates (K-1) were single celled and allowed out for three (3) hours per week and for visits. Inmates in the limited activity classification, a voluntary status, (K-2) were double-celled and permitted out of their cells for six (6) hours each week and for visits. Death row inmates (J-3) were single-celled and permitted out of their cells for two (2) hours per week and for visits. Inmates in disciplinary isolation, a temporary classification, (J-2) were permitted out of their cells for one (1) hour each week and for visits. Newly received inmates (K-5) were double-celled and permitted out of their cells for four (4) hours exercise each week, visits, meals and orientation. Inmates in the general population (K-6 to K-8 and L-1 to L-8) were permitted out of their cells from 6:30 a.m. to 9:30 p.m. to work, attend classes, visit the library, exercise in the gyms, eat, shower, use the day rooms and other chosen and required activities (P.A. 16-18). A similar dichotomy between general population and special classification exists in most prison systems. See the memorandum of the United States, pp. 4, 10.

In their brief filed herein, respondents submit in support of their argument that other courts have found double celling to have been unconstitutional under the "totality of circumstances" doctrine. An examination of these cases discloses that in each it was found that conditions were horrible, depriving the inmates of most, if not all, of their constitutionally protected entitlements and were such as to shock the conscience of the court and in fact were cruel and barbarous. Appellees cite a recently decided case, *Ramos v. Lamb*, No. 79-2324 (10th Cir. 9-25-79). That case reviewed *Ramos v. Lamb*, 485 F. Supp. 122 (D. Col. 1979). The prison involved in *Ramos* was antiquated, built for the most part in the early part of this century. The district court in its findings of fact set forth:

> As will be stated more explicitly, the evidence in this case shows that prisoners in the Canon Correctional Facility are housed under conditions which fall below all recognized constitutional and professional standards. Those conditions include insufficient living space with inadequate sanitation, ventilation, light, heat, noise control and fire safety; lack of protection from violence; massive and pervasive idleness because of lack of productive activity; inadequate medical care (both mental and physical); and unnecessarily restrictive classification of prisoners into security classifications which exacerbate physical and mental deterioration. 485 F. Supp. at 133.

The district court herein made no such finding.

In *Ramos* the district court mandated among other things that pending a stay, each inmate must be involved in some sort of productive activity at least eight hours a day and that no inmate might be housed in less than 80 square feet for 20 or more hours a day. 485 F. Supp. at 170.

In its review of the district court decision and order, in a carefully considered opinion consisting of 76 pages, the court of appeals thoroughly considered each of the district court's findings of constitutional deprivations and at page 15 of its opinion stated:

> We conclude that in the areas of shelter, sanitation, food, personal safety, and medical care — *the core areas in any Eighth Amendment claim* — the district court's findings and conclusions of

> violations of the plaintiffs' rights are entirely justified and supported by the record. We do not think, however, that the record in this case requires or justifies going into all of the concepts on penology pressed by the plaintiffs and adopted in the district court's opinion — *the concept of motility, classifications, and idleness — since the shortcomings in these areas are not of constitutional dimension* (emphasis added).

The Court of Appeals then vacated that part of the district court's order dealing with motility, classification and idleness.

These areas upon which the court of appeals in *Ramos* reversed the district court, motility and idleness, were the primary bases for findings below that double celling at S.O.C.F. was unconstitutional. The court of appeals herein sustained the district court in a less than two page order.

The respondents have also contended that the district court's order is reasonable in light of the lengthy sentences being served at S.O.C.F. While it is true that many prisoners are serving long sentences, those sentences, except in a very few cases, are seldom entirely served in one institution. Prisoners at S.O.C.F. are reclassified on a regular basis to other institutions.

III. Penological Purpose

Respondents assert that double celling serves no penological purpose. Invariably however that mistakes the question and harkens back to the compelling necessity test rejected in *Bell v. Wolfish*, 441 U.S. 520 (1979). The question is not whether double celling serves a penological purpose with respect to the individual inmate's

rehabilitation, but whether the practice causes "genuine deprivation and hardship". *Bell, supra* at 543. Moreover respondents use the term "penological purpose" in a self limiting sense by focusing only on the individual inmate. The self-evident basic function of a prison is to separate convicted felons from the general population. Unless the institution of prison is forbidden, a practice which increases the ability and capacity of society to perform this function also serves a penological purpose. Double-celling at S.O.C.F. allowed the classification of maximum security prisoners to a maximum security institution thereby insuring the safety of the general public and the safety of the inmates of Ohio's medium and minimum security institutions.

The decision of the district court limiting the population of S.O.C.F. to a specific number, not only obstructed the classification process, but caused the reopening of closed sections of the Ohio Penitentiary, the institution S.O.C.F. was designed to replace. Respondents' allegation that the district court's order was easily complied with is simply not true.

IV. *Bell v. Wolfish*

By attempting to factually distinguish M.C.C., the institution involved in *Bell v. Wolfish*, and S.O.C.F., respondents illustrate the failure of the courts below to grasp the essence of the holding in that case. Petitioners will not attempt to deny that factual variations obviously exist, though disputing some overstatements and misstatements of the differences. Rather the central point of *Bell* was that there is no one man — one cell principle lurking in the Fifth Amendment nor is such a principle embodied in the Eighth Amendment. For double-celling to be part of the calculus in the "totality of the circumstances" something more than the practice must be shown.

Genuine privation and hardship, factors not evident on the record of this case, must be proved. The term "totality of the circumstances" states a conclusion not an analysis of the factors which show "privation and hardship". While perhaps useful as a "catchword" to justify the result in a prison correctly pictured as "a dark and evil world completely alien to the free world", *Hutto v. Finney*, 437 U.S. 678,681 (1978), the magic invocation of the term does nothing to further the analysis. The question presented to this court is clear. Can a modern institution like S.O.C.F. utilize double-celling to alleviate the pressures of increased prison commitments where prisoners are not thereby denied the minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and general safety? As the district court made an *ad hoc* determination on the practice of double celling itself, reversal is dictated.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief have been served on respondents, Kelly Chapman, #122-531, P.O. Box 45699, Lucasville, Ohio 45699 and Richard Jaworski, #734304, River Junction Correctional Institution, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210, Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215, Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio, 44113, Bruce A. Campbell and Elinor Alger, American Civil Liberties Union of Ohio Foundation, Inc., 360 South Third Street, Columbus, Ohio, 43215, and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio, 43201, by United States mail, postage prepaid, this day of February, 1981. I further certify that all parties required to be served have been so served.

ALLEN P. ADLER
Assistant Attorney General

No. 80-332

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

v.

KELLY CHAPMAN, et al.,

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Brief of the States of Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the Government of the Virgin Islands In Support of Petitioners, Amici Curiae

JAMES M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAMES E. MOUNTAIN, JR.
Assistant Attorney General
JAN PETER LONDAHL
Assistant Attorney General
Counsel of Record
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Amici

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INTEREST OF AMICI CURIAE

Amici are states which operate penal institutions within their respective jurisdictions. The prison population in many of these institutions has risen dramatically in recent years. State prisoners have, in turn, sought relief in the federal courts from allegedly overcrowded prison conditions. The lower federal courts have responded by intervening in the administration of state penal institutions on the basis of various

interpretations of the Eighth Amendment. This case presents the first opportunity for the Court to define the contours of the Eighth Amendment and its application in the context of prison condition lawsuits.

SUMMARY OF ARGUMENT

In this case, the district court ordered the State of Ohio to reduce the inmate population at its Southern Ohio Correctional Facility (S.O.C.F.) by 38%. *Chapman v. Rhodes,* 434 F. Supp. 1007, 1022 (S.D. Ohio, 1977). Regardless how such an order is phrased, it necessarily involves the transfer (presumably to newly constructed facilities), or the premature release, of 1,400 convicted felons. *See,* 434 F. Supp. at 1021, 1022. The order dramatically impacts upon the expertise-based action of state correctional authorities, the planning and fiscal prerogatives of the state legislative and executive branches, and the criminal dispositional discretion of the state's judiciary. Such a broad and far reaching compromise of the constitutionally-based principles of federalism, comity and the separation of powers ought not be lightly undertaken by the federal trial courts nor casually reviewed on appeal.[1] Although the federal judiciary must discharge its duty to

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[1] See *Procunier v. Martinez,* 416 U.S. 396, 404-405 (1974):

"'Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficiacy of judicial intervention. Prison administrators are

(Continued on following page)

protect fundamental constitutional rights from violation in state penal institutions, *see, e.g. Johnson v. Avery,* 393 U.S. 483 (1969), it must also remain appropriately sensitive to constitutional principles of federalism. The standards for determining whether constitutional rights have been violated, therefore, ought to be sufficiently clear and well defined to permit application and enforcement without "intrud-[ing] upon state policy any more than necessary." *White v. Weiser,* 412 U.S. 783, 795 (1973). *Cf. United States v. New Mexico,* 438 U.S. 696 (1977).

The constitutional imperative which underlies the order in this case is the district court's conclusion that the conditions of confinement at S.O.C.F. constituted cruel and unusual punishment in violation of the Eighth Amendment. This conclusion is grounded on the court's finding that, under the "totality of the

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> responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.' "

See also, Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978); Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Det. C.L. Rev. 795.

circumstances," those conditions were "shocking to the conscience." 434 F. Supp. at 1019. As the district court itself recognized, "[s]ince the 'totality' of the circumstances differ from case to case, it is difficult to find 'controlling' authority." *Id.* In fact, the standard applied by the district court is so subjective that it virtually insulated the trial court's order from appellate review. The Sixth Circuit was left to conclude that the findings of fact were not "clearly erroneous", that the conclusions of law were "permissible," and that the remedies provided were "reasonable".

The conditions of S.O.C.F. which shocked the District Court's conscience in this case are so inherently unshocking that their recitation sufficiently betrays the Court's error. In addition to the fact that double celling was occurring, due to an inmate population 38% over design capacity, the District Court supported its conclusion with findings that there were not enough jobs to go around, double celling interfered with studying, and psychological and social worker staffs were numerically inadequate. The Court expressly found that food, ventilation, medical and dental care were adequate; staffing was acceptably proportionate; violence was not increased due to double celling; and visitation, plumbing, lighting, and law library facilities were not demonstrably inadequate. In short, notwithstanding its purported consideration of the totality of the circumstances, the Dis-

trict Court found an Eighth Amendment violation and mandated fundamental changes in Ohio's correctional system because a significant number of inmates were double-celled.

Amici submit that the holding of the District Court in this case and the Sixth Circuit's summary affirmance are symptomatic of the imbalance of state-federal power which has resulted from the highly subjective, non-analytic formulae which the lower federal courts have devised for addressing Eighth Amendment claims in the context of prison condition suits. Employing the rubrics of "Evolving Standards of Decency",[2] "Shocking to the Conscience"[3] or "Totality of the Circumstances",[4] the lower courts have produced the anomalous and logically troublesome result that, thus far, prisons in at least 29 jurisdictions have been held to be "unusual". *See* Tucker, The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, B.C. Env. Aff. L. Rev. 665 (1979).

These tests have, in effect, converted the minimum standards embodied in the Eighth Amendment into an affirmative jurisdictional base from which federal dis-

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[2] *Battle v. Anderson*, 564 F2d 388 (10th Cir. 1977); *Hite v. Leeke*, 564 F2d 670 (4th Cir. 1977); *Nadeau v. Helgemoe*, 561 F2d 411 (1st Cir. 1977); *Gates v. Collier*, 501 F2d 1291 (5th Cir. 1976); *Sweet v. South Carolina Dept. of Corrections*, 529 F2d 854 (4th Cir. 1975).

[3] *Nadeau v. Helgemoe, supra; Williams v. Edwards*, 547 F2d 1206 (5th Cir. 1977); *Crowe v. Leeke*, 540 F2d 740 (4th Cir. 1976); *French v. Heyne*, 547 F2d 994 (7th Cir. 1976); *Holt v. Sarver*, 442 F2d 304 (8th Cir. 1971); *Sweet v. South Carolina Dept. of Corrections, supra.*

[4] *Crowe v. Leeke, supra; Sweet v. South Carolina Dept. of Corrections, supra; Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194 (8th Cir. 1974).

trict courts can impose apparently unreviewable architectural and penological standards upon the states. The tests are not supported in either the history or language of the Eighth Amendment; nor are they consistent with the decisions of this Court. More importantly, the tests are neither a necessary nor desirable means of protecting constitutional rights.

A more precise, objective, and workable test can and ought to be applied in reviewing prison conditions. Prison conditions should be evaluated in terms of their tendency to cause extreme or unnecessary pain. Such a test, rooted in the history of the amendment and the commonly understood meaning of the term "cruel and unusual", has been articulated and applied by this Court in other contexts.[5] Its application to prison conditions would provide a more objective standard which is more susceptible to meaningful appellate review. It would protect against conditions of confinement which can be reasonably characterized as cruel while restricting the intrusiveness of federal intervention.

ARGUMENT

I

STANDARD FOR EVALUATING PRISON CONDITIONS

A. *Historical Background*

Although the application of the Eighth Amendment must be guided by the "evolving standards of

[5] *See, e.g., Coker v. Georgia,* 433 U.S. 584, 592 (1977); *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) and cases cited infra.

decency that mark the progress of a maturing society", *See Trop v. Dulles,* 356 U.S. 86, 100-01 (1958), identifying the kinds of abuses addressed by the amendment is, fundamentally, an historical question. The circumstances surrounding the adoption of the amendment and its British antecedent indicate that it was intended to address three distinct abuses: the imposition of cruel and unusual *methods* of punishment; the imposition of penalties that are illegal or unauthorized by statute; and the imposition of punishments which are disproportionate to the offense.

A complete account of the debates in the First Congress relating to the adoption of the Eighth Amendment is contained in *Furman v. Georgia,* 408 U.S. 238, 258-63 (1972) [Brennan, J., concurring]. These debates indicate that the framers of the Constitution only intended to proscribe "tortures and other barbarous methods of punishment." *Estelle v. Gamble,* 429 U.S. 97, 102 (1976). There was little debate on the measure when it was adopted. This absence of debate is, no doubt, attributable to the fact that the language of the Amendment was commonplace at the time, having been drawn from the provisions in nine state constitutions which had in turn adopted the language of the English Bill of Rights of 1689 (1 Will. § 2 ch 2) [collected in 8 English Historical Documents, 1660 - 1714, p. 121 (1953)]. The interpretation of the Eighth Amendment as a prohibition

against cruel methods of punishment is primarily derived from the intentions of the American framers, but it may also have been a concern of the framers of the English Bill of Rights.[6]

The prohibition of unauthorized or illegal penalties may be traced to the litany of grievances against James II contained in the English Bill of Rights. Among the grievances are complaints that,

> "[E]xcessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberties of the subjects;

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[6]The immediate impetus for the cruel and unusual punishment provision in the events of 1660-88 is obscure. Traditional theory argues that the provision was a response to the Bloody Assizes of 1685. Current historical theory, influenced by Professor Granucci's article, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969), argues that the provision was intended as a response to the punishment inflicted on Titus Oates by Lord Chancellor Jeffreys following Oates' conviction for perjury in connection with this testimony in the Popish Plot trials of 1678-79. The theory seems implausible and is almost certainly too narrow an explanation of the reason for the provision.

Oates, following the Revolution of 1688, petitioned the House of Lords for relief from the two judgments and verdict against him, but the petition was rejected. The parliamentary debates do not reflect that the prohibition in the Bill of Rights was intended to remedy Lord Jeffreys' judgment against Oates; and if that had been its understood purpose, it seems unlikely that the House of Lords would have rejected Oates' petition. *See,* 10 Howell, State Trials 1326-1330 (1886); 9 Gray, Debates in the House of Commons 286-94 (1763); Kenyon, The Popish Plot 259-62 (1972).

Torture, other than *piene forte et dure,* was not legal in Seventeenth Century England. 1 Macauley, History of England from the Accession of James II 72 (1856); Ogg, England in the Reigns of James II and William III 244 (1955). The Scottish Claim of Right of 1689, which offers an instructive parallel to the Bill of Rights, complains of the use of "inhuman tortures without any evidence and in ordinary crimes," and declares, "That the using torture without evidence or in ordinary crimes, is contrary to law." The usual explanation for this provision is that it was intended to prohibit the methods of interrogation employed to force William Carsteres to divulge information about the Whiggish Rye House Plot of 1683. Thumbscrews, which were "unusual", having been imported from Muscovy in August of 1684, Id., at 173, had been used on Carsteres and the Scotch Privy Council had threatened to use the boot of pain. See, M'Crie, Scotland's Part and Place in the Revolution of 1688 61-66 (1888). James, during the period following the Rye House Plot, personally presided during tortures conducted in the Scottish Privy Council. Macauley, supra, at 203.

"And excessive fines have been imposed:

"And *illegal* and cruel punishments inflicted;

"And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied;

"*All of which are utterly and directly contrary to the known laws and statutes and freedom of this realm.*" (Emphasis supplied.)

Although the origins of the cruel and unusual punishment provision in the declaration of rights are obscure and "* * * modern historiography has done less than justice to the Bill of Rights." Ogg, *supra,* note 6 at 244, it is nevertheless probable that the cruel and unusual punishment clause embodied ancient rights.[7] The origin of the prohibition against disproportionate. punishment is traceable to such ancient rights. It is traceable to Cap. 20 of the Magna Charta of 1215 provides, in part:

"A freeman shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced according to

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[7] "Except in this article of the dispensing prerogative, we cannot say, on comparing the bill of rights with what is proved to be the law by statutes, or generally esteemed to be such on the authority of our best writers, that it took away any legal power of the crown, or enlarged the limits of popular and parlimentary privilege. The most questionable proposition, though at the same time one of the most important, was that which asserts the illegality of a standing army in time of peace, unless with consent of parliament." 2 Hallam, The Constitutional History of England 318-319 (1880). See also, 1 Stephen, History of the Criminal Law of England 412 (1883):

"[The Bill of Rights] converted many doubtful propositions into law by saying that they were 'ancient rights and liberties' when all that could truly have been said was that it would have been well to act upon that supposition in the past and that for the future the matters stated should be held to be law."

the gravity of the offence, saving his contenement. . . ."

The Magna Charta prohibition against disproportionate amercements had, by 1615, been understood to prohibit disproportionate punishment. *Hodges v. Humkin, Maior of Liskerret,* 80 Eng Rep 1015 (K.B. 1615). By 1621, the amercement clause had been held to prohibit excessive fines. Thompson, Magna Charta 295 (1948).

An "historical interpretation" of the Eighth Amendment, which would limit its application to those torturous methods of punishment which the framers intended to address, has not prevailed. See, *Furman v. Georgia, supra,* at 274-69 (Brennan J., concurring). Rather, this Court has recognized that the Amendment embodies each of the three discrete prohibitions outlined above. As the nature of those prohibitions and their history suggest, each form of claim entails different standards of resolution and each calls for a distinct analytic approach. Thus, determination of the standard for resolution of prison condition claims first requires identification of the Eighth Amendment prohibition involved.

B. *Nature of the Eighth Amendment Claim In Prison Condition Suits*

A complaint that certain prison conditions violate the Eighth Amendment is a complaint that the method of punishment is cruel and unusual and must

be analyzed according to criteria applicable to that type of claim. Although it can be argued that the conditions of imprisonment are disproportionate to a particular offense, disproportionality cannot be the claim in class action law suits involving a wide class of prisoners, some of whom have been convicted for heinous offenses. The claim of disproportionality is, of necessity, an individualized claim that is inappropriate to the structural reform law suit of which this case is a typical example.[8] See, Robbins and Buser, Punitive Conditions of Prison Confinement: An Analysis of *Pugh v. Locke* and Federal Court Supervision of State Penal Administration Under the Eighth Amendment, Stan. L. Rev. 893, 903-04 (1977).[9]

Thus, the generalized nature of class action prison condition claims necessarily precludes analysis and evaluation of the method of punishment in terms of its suitability to the criminal conduct which prompted it. The court is forced to consider the acceptability of the

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[8]Similarly, it cannot be seriously contended that a general prison conditions lawsuit involves a claim of illegal or unauthorized punishment. Although it could be argued that incarceration is "unauthorized" because penal statutes cannot "authorize" cruel and unusual punichment, such a claim is hopelessly circular and depends ultimately on a finding that the method of punishment is cruel.

[9]"Because this [disproportionality] test was developed in cases involving the trial judge's or prison official's discretionary power in imposing specific sanctions, generally increasing those already meted out at sentencing, it is particularly inappropriate in evaluating ongoing conditions of confinement for the general prison population. Challenges to a cumulation of prison conditions that daily affect the inmate community and that do not include the imposition of extra punishments following particular transgressions of prison regulations cannot profitably draw on this essentially transactional theory."

challenged conditions *per se*. If an Eighth Amendment violation is held to exist, the conditions are necessarily deemed to be an unacceptable punishment for any crime.

C. *The Traditional Test and the Concept of Pain*

A claim that certain prison conditions constitute an impermissible method of punishment invokes the concerns of the framers of the Constitution and the core concept of the Amendment.[10] During the first century following the enactment of the Eighth Amendment a complaint that a particular method of punishment was cruel and unusual was the only cognizable type of claim. Consistent with what is known of the framers' intentions, the Ninteenth Century cases only inquired whether punishment inflicted torture or an unacceptable degree of unnecessary pain. It was not until 1910, that this Court held that disproportionate penalties fell within the ambit of the Eighth Amendment prohibition. *Weems v. United States,* 217 U.S. 349 (1910).[11]

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[10] "The primary purpose [of the cruel and unusual punishment] clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." *Powell v. Texas,* 392 US 514 531-32 (1968).

[11] Of the five cases addressing Eighth Amendment claims prior to *Weems v. United States,* 217 U.S. 349 (1910), three reject claims that the sentence meted out was disproportionate to the offense. *Pervear v. Commonwealth,* 5 Wall. 475 (1867) [fine and imprisonment at hard labor for bootlegging]; *O'Neil v. Vermont,* 144 U.S. 323 (1892) [potential imprisonment at hard labor for 28, 866 days for furnishing liquor]; *Howard v. Fleming,* 191 U.S. 126 (1903) [10 years imprisonment for conspiracy to defraud]. Only

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Even after *Weems,* claims that certain modes of punishment were cruel and unusual have been met with traditional analysis. In *Louisiana ex rel Francis v. Resweber,* 329 U.S. 459 (1974), the petitioner claimed that it was cruel and unusual to sentence him to die by electrocution when a previous attempt had failed. The Court approached the problem with familiar notions drawn from the history and language of the Eighth Amendment:

> "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688.
>
> ". . . . .
>
> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of

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Wilkerson v. Utah, 99 U.S. 130 (1879) and *In re Kemmler,* 136 U.S. 436 (1890) analyze the issue of whether certain methods of punishment are cruel and unusual. *Wilkerson,* in holding that death by shooting does not violate the Amendment, notes that shooting is a traditional method of execution and stresses that "[I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." 99 U.S., at 136. *In re Kemmler* relies heavily and with approval on the New York courts' discussion and holding that electrocution is not cruel and unusual. That discussion centers on the issue of whether and to what extent electrocution inflicts pain. It concludes that electrocution, as a method of execution, ". . . under such conditions and in the manner contemplated by the Statute, must result in instantaneous, and consequently in painless death." 136 U.S., at 443-44. See the discussion of *Kemmler* in *Louisiana ex rel Francis v. Resweber,* 329 U.S. 459, 475-76 (1974) (Burton, J., dissenting).

cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.* at 463-64.

In considering method of punishment claims, this Court has always framed its inquiry to determine whether the challenged punishment inflicted an impermissible degree of physical pain. Underlying the inquiry, has been the understanding that the language of the Eighth Amendment was intended to prohibit tortures and other barbarous and inhumane punishments, the gratuitous infliction of extreme pain and suffering. The inquiry has been variously expressed: "unnecessary cruelty," *Wilkerson v. Utah, supra*; "unnecessary pain," *Louisiana ex rel Francis v. Resweber, supra*; "wanton infliction of physical pain," *Furman v. Georgia,* 408 U.S. 238, 392-93 (1972) [Burger, C.J., dissenting]; "unnecessary and wanton infliction of pain," *Gregg v. Georgia,* 428 U.S. 153, 173 (1976); "purposeless and needless imposition of pain and suffering," *Coker v. Georgia,* 433 US 584, 592 (1977); "infliction of such unnecessary suffering [as to be] inconsistent with contemporary standards of decency," *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). Although the method of expression has differed, there has been little doubt as to the actual lineaments of what is intended. This Court has always fixed on pain as the lodestar against which the minimum standard of the Eighth Amendment is measured.

The cases illustrate that the Eighth Amendment does not proscribe all pain. A standard for evaluating methods of punishment must therefore distinguish impermissible methods or conditions in terms of both the quality and quantity of pain involved.

D. *The Degree of Pain: The Meaning of Cruel*

It is clear that the framers of the Eighth Amendment intended to prohibit an evil minded infliction of the excruciating pain associated with torture. *See, Estelle v. Gamble, supra,* 429 U.S. at 102; *Furman v. Georgia, supra,* 408 U.S. at 377 (Burger, C.J., dissenting). The fairest reading of the language of the Amendment would interpret it to prohibit the unnecessary infliction of severe pain. Such a reading is roughly consonant with the intentions of the framers and does not distort the commonly understood meaning of the term "cruel and unusual punishment".

According to dictionary definitions, both "cruel" and "punishment" connote, in different degrees and contexts, pain.[12] Cruel means "disposed to inflict pain . . . pleased by hurting others. . . . Severe, distressing, extremely painful."[13] Punishment means "retri-

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[12]The primary, if now somewhat obsolete, definition of "pain" reveals its association with punishment:

"1. Suffering or loss inflicted for a crime or offense; punishment; penalty; a fine.

"2. A primary condition of sensation or consciousness, the opposite of *pleasure*; the sensation which one feels when hurt (in body or mind); suffering, distress." 7 O.E.D. 377 (1933).

[13]The Oxford English Dictionary defines "cruel", when applied to conditions and circumstances, as "Causing or characterized by great suffering; extremely painful or distressing." 2 O.E.D. 1216 (1933).

butive suffering, pain or loss." Webster's Third New International Dictionary (1976). Thus, according to the ordinary meaning of its language, the Amendment bars the gratuitous infliction of severe pain.[14]

Fixing the degree of pain that is "cruel and unusual" is inevitably a judgment which must be made according to "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 100-101. However, it is plain that the kind of pain prohibited is that which hurts; that which causes one to say "ouch". A minimum requirement for scrutiny under the Eighth Amendment is that the pain inflicted be the kind which hurts in a sharp or acute way. The Eighth Amendment was not intended to and does not prevent mild physical sufferings which may in some sense be "unnecessary". It does not require that the State house prisoners in the Hay-Adams and enroll them at Georgetown because they would otherwise be "unnecessarily" discomfitted. See *Fur-*

[14] Professor Granucci cites Sir James Murray's selection, in the Oxford English Dictionary, of Swift's description of his cold as cruel for the proposition that "[T]he word "cruel" had a less onerous meaning than it has today. In normal usage it simply means severe or hard." *Granucci, supra,* n. 6, at 860. The selection proves only that the word "cruel" has its metaphoric uses. Samuel Johnson, who ordinarily drew on 16th and 17th Century sources, defines cruel as:

"(1) Pleased with hurting others; inhuman; hardhearted; without pity; without compassion; savage; barbarous; unrelenting.

"(2) [Of things.] Bloody; mischievous; destructive; causing pain."

1 Johnson, Dictionary of the English Language [unpaginated] (1755). Even a cursory look at the seventeenth century literature demonstrates that the word 'cruel,' then as now, like most words, derives meaning from context. See, e.g., John Dryden's 1665 play *The Indian Emperour*:

> "If then thou art that cruel god whose eyes Delight in Blood, and Humane Sacrifice," Dryden, The Dramatic Works 284-85 (Summers, ed. 1932).

man v. Georgia, supra, 408 U.S., at 391-93 [Burger, C.J. dissenting].

As the Fifth Circuit has noted:

> "If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight." *Newman v. Alabama,* 559 F.2d 283, 291 (5th Cir. 1977).

Denial of any of the items catalogued in *Newman* causes identifiable, quantifiable, physical pain. Although a judgment as to whether such pain is "cruel and unusual" focuses on one's mental state, it is specific and objectively measurable. It can therefore be subjected to meaningful review and it can be implemented by specific remedies.

It has been suggested, but never squarely held, that the Eighth Amendment prohibits severe mental as well as physical pain. *See, e.g., Furman v. Georgia, supra,* 408 U.S. at 271 (Brennan J., concurring). This suggestion may be consistent with the foregoing analysis so long as the kind of prohibited mental pain is identified. Pain is a sensation and therefore all pain is, in a sense, mental. Regardless of whether it is inflicted by physical or psychological means, pain can be sharp or acute. If the kind of physical pain proscribed by the Eighth Amendment is that which hurts — the sort of pain that is produced by "cruel punishment" — the appropriate psychological analogue is mental pain

that hurts. The paradigm of such mental anguish is the effect of a Chinese water torture. Just as the Eighth Amendment prohibits the unnecessary infliction of the kind of pain that hurts and not the kind of pain that is identified as a dull ache, it also prohibits actual mental anguish but does not prohibit a sense of anxiety.

E. *Application of the Pain Standard To Prison Conditions*

When applied to the context of prison reform litigation, the pain standard is capable of responding to a surprisingly broad range of prison conditions. Amici maintain that the standard is fully adequate to guarantee the basic human requirements which the constitution seeks to protect. Inadequate medical or dental care, long term denial of food or clothing, pestilential squalor, and violence, whether inflicted by guards or other inmates, are all circumstances that cause pain. If such conditions are so severe that they may, according to evolving standards of decency, properly be characterized as cruel, then they are prohibited.

The Eighth Amendment was designed to respond, and does adequately respond, to the kinds of conditions detailed in the Arkansas prison cases.[15] The

[15]The protracted litigation involving the Arkansas prison system is found in the following cases:

Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); *Jackson v. Bishop*, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated*, 404 F.2d 571 (8th Cir. 1968);

(Continued on following page)

prison at Cummins Farm housed an average of four and sometimes as many as 10 or 11 prisoners in 80 square foot cells. This kind of overcrowding, the use of the Tucker telephone, brutal ad hoc punishments, rampant and uncontrolled violence, lack of medical treatment, and an inadequate diet combined with harsh working conditions are individually and collectively conditions to which a traditional reading of the Eighth Amendment is addressed.

In contrast, the complaints by prisoners in this case do not approach the ambit of the Amendment. Being lodged with another person in a 60-foot-square cell is no doubt an inconvenience; it is no doubt uncomfortable, but there is no ordinary sense in which that condition can be labelled cruel. Adding numerically inadequate psychological and social work staff, interference with study, and lack of jobs to the central double celling condition cannot alter the characterization, not just because the Eighth Amendment does not mandate rehabilitative programs and conditions, but because there is nothing about those conditions, taken singly or in the aggregate, that can fairly bear the epithet "cruel." Even assuming that in some sense

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Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd.* 442 F.2d 304 (8th Cir. 1971); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd in part and reversed in part sub nom Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194 (8th Cir. 1974); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 743 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

these conditions may be said to inflict pain, it seems obvious that the kind and degree of pain prohibited by the Eighth Amendment is absent.

II

LOWER FEDERAL COURT TESTS

The lower federal courts have not evaluated prison conditions according to these traditional Eighth Amendment standards. They have failed to determine whether, singly or in the aggregate, the challenged conditions cause pain and, if so, whether the pain is so unnecessary and severe that, according to contemporary standards of decency, the conditions can fairly be characterized as cruel. Nor have the courts restricted their remedies to the elimination of impermissibly painful conditions. Rather, beginning with *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F2d 304 (8th Cir. 1971), they have interpreted the Eighth Amendment as affirmative authority to cure a perceived deep and abiding social ill — inadequate and in some cases deplorable prison conditions. Employing a variety of vague and highly subjective standards, the lower courts have exercised virtually unreviewable discretion to mandate far reaching bureaucratic reform. Those standards have included, most prominently: a "totality of the circumstances" approach to measure prison conditions; a misapplication of the *Trop v. Dulles* dictum to mandate prison conditions that comply with the court's standard of decency; and

a peculiar use of the Due Process "shock the conscience" standard to gauge the propriety of conditions.

A. *Totality of the Circumstances*

Lower federal courts have inquired whether particular prison conditions in the aggregate constitute cruel and unusual punishment. There is nothing inherently fallacious about such an analysis but, in its application, it has become grossly distorted. The approach originated with *Holt v. Sarver, supra,* and was applied to conditions which were so deplorable that no one would seriously argue that the Eighth Amendment was not breached. But, by a series of chiaroscuro renderings, the approach has evolved to its present form:

> "The question is constantly stated as one of ascertaining the 'totality of the circumstances' of the particular case and then inquiring into whether the totality as determined is intolerant (sic) or shocking to the conscience, or barbaric or totally unreasonable in the light of the ever changing modern conscience." *Chapman v. Rhodes,* 434 F Supp 1007 (S.D. Ohio (1977)).

As applied by the lower courts, the standard is deficient in at least three respects.

In the first place, the analysis is holistic; it does not require that any single condition violate the Eighth Amendment for an aggregate violation to be found. An analysis of the totality, including subjective impressions which cannot be recorded, makes it possible for the whole to be greater than the sum of its parts.

Additionally, the application of the standard avoids meaningful analytic or factual review. The more general the statement of the conclusion, the more arduous the tasks of appellate review become. The generalized nature of the totality approach, coupled with the subjectivity of the substantive standard with which the test is always linked,[16] reduced the Sixth Circuit to holding that the "conclusions of law are permissible."

Another notable feature of the "totality" standard is that the failure to identify any particular violation of the Eighth Amendment leads to a generalized intrusion on the functioning of the state bureaucracy. The conclusion that the whole institution is unconstitutional leads to the apparent corollary that the whole institution must be remedied. Rather than identifying individual violations and formulating individual remedies, the court is able, and in some ways impelled by the breadth of the conclusion, to mandate wide and continuing remedies that deeply compromise institutional integrity.[17].

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[16]The substantive standards, notions of decency or shocked conscience, are discussed below.

[17]Robbins and Buser, supra, at 920, make a stronger assertion:

"Yet, because he used the 'totality of conditions' approach, which bases the right to relief on a conglomeration of 11 considerations, Chief Judge Johnson was *forced* into adopting a remedy that responded to all 11 considerations — a remedy that inevitably would be far ranging. It may seem ironic, nonetheless, that inmate-plaintiffs who are unable to make out a constitutional cause of action based on any one prison conditions in effect may receive the same relief as if they had made out and *succeeded* on *11* such claims; it only adds to the irony that such

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Finally, the "totality" approach fails because of its false predicate. The test does not inquire whether the conditions wantonly inflict serious physical or mental pain. It focuses on whether the conditions are "intolerable," or "shocking to the conscience," or "barbaric," or "totally unreasonable in the light of the ever changing modern conscience". These phrases are apparently understood to be synonymous but their meaning is undefined. Clearly, however, they do not quantify pain. Standing alone, they bear no relation to the Eighth Amendment or its underlying principles.

B. *Substantive Standards: Evolving Standards of Decency and The Shocked Conscience*

The "Evolving Standards of Decency" test is derived from Chief Justice Warren's statement, in the plurality opinion in *Trop v. Dulles, supra,* that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01. The statement is dictum because it formed no part of the dispositive pronouncement. It appears in a discussion of a ground for relief that was joined by only three other members of the Court. The dictum merely states the generally

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inmates also may be entitled to a plethora of remedies that require significantly more intensive and constitutionally less obvious forms of federal court supervision over state agencies than the remedies available under any one such claim would require."

The wider remedy is not, of course, "forced." Judge Johnson could have chosen, for example, to remedy a select group of conditions in order to reduce deleterious conditions to a constitutional minimum.

recognized view that what is "cruel and unusual" will have different specific applications in different historical periods.

In utilizing the statement as a standard against which prison conditions are measured, the lower federal courts have ignored a critical component in the formulation. The courts have omitted cruel and unusual punishment from analysis. The intention of the *Trop* language is to stress that the Eighth Amendment draws its meaning from evolving standards of decency *as to what is cruel and unusual.* The omission has led courts to inquire as to the decency of conditions irrespective of whether those conditions inflict an impermissible degree of unnecessary pain. Courts have interpreted *Trop v. Dulles,* in the prison condition context, to require that the conditions adhere to a generalized standard of decency; and they have declared unconstitutional those conditions which they characterize as indecent.

When the focus is shifted from cruel punishment to the decency of conditions, a wide range of circumstances which would not ordinarily draw Eighth Amendment scrutiny become relevant. Conditions which would not invoke traditional Eighth Amendment analysis, such as deteriorating physical facilities, idleness, a general lack of rehabilitative programs, and double celling, suddenly become important. Applying this "decency" standard, courts have

converted the architectural design capacity of an institution and ideal standards for square footage into constitutional minimums. *See, e.g. Chapman v. Rhodes, supra* 434 F. Supp. at 1020 (design capacity); *Battle v. Anderson,* 447 F. Supp. 516, 525 (ED Okla. 1977) (American Public Health Association Standards). This court has, in the context of pretrial detention, expressly disapproved such a practice:

> "[W]hile the recommendations of these various groups may be instructive in certain cases, they simply do not establish the Constitutional minima; rather, they establish goals recommended by the organization in question." *Bell v. Wolfish,* 441 U.S. 520, 544 n 27 (1977).

The "Shocking to the Conscience" test similarly shifts the focus away from cruel punishment to circumstances which would not otherwise be cognizable. The test is imported from Justice Frankfurter's Due Process analysis in *Rochin v. California,* 342 U.S. 165 (1951). Under the test, a host of activities and conditions that have nothing to do with cruelty or the infliction of pain may be proscribed.

The *Rochin* standard is, like the decency standard, notoriously subjective. Even when it is as carefully applied as it was by Justice Frankfurter, it poses extraordinary problems. *Rochin v. California, supra,* at 175-77 (Black, J., concurring). It involves value judgments that depend on the state of one's conscience; and the state of one's conscience is more likely to be a product of individual economic and social circum-

stances than any identifiable civilizational norm. Under both the shock the conscience and the evolving standards test, meaningful appellate review is all but impossible. Refutation or verification of the conclusion that a given set of conditions is shocking to the conscience or indecent is simply not a task of which the ordinary judicial instruments of logic and language are capable. This is especially true where, as here, the conclusion is applied to a subtle and complex interrelation of social and physical circumstances. Because the conclusion that a given set of conditions is shocking or indecent cannot be reviewed, or analytically approached, the conclusion is essentially discretionary. Thus, lower federal courts are invested with broad discretion to determine whether or not they should exercise the power to reform state prisons. This discretion has, predictably, been exercised in favor of federal intrusion in nearly every instance in which the issue has arisen.

Since 1970, lower federal courts have employed one set of standards when individual Eighth Amendment claims have been advanced and quite another set of standards when structural reform prison condition law suits are at issue. In the prison condition cases, the lower courts have, in diverse ways, infused Eighth Amendment analysis with highly subjective standards for which there is no basis in principle and slender policy justifications.

C. *Remedies*

Federal court reform of state prisons deeply compromises the constitutionally based principles of federalism, comity, and separation of powers. See, Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661 (1978); Haas, Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 Det. C.L. Rev. 795. Moreover, considerations of policy that are of less than constitutional magnitude urge a more traditional analysis. The disabilities of the structural reform law suit,[18] the lack of judicial expertise in penology, the decline in prison discipline that attends judicial intervention, and the increased federal dockets that result from encouraged §1983 litigation all weigh against the broad remedies being imposed under the lower federal courts tests.

Amici contend that the specificity and objectivity of the analytical standard which we advocate facilitate the use of less intrusive remedies to address Eighth Amendment violations. Once a federal court

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[18]See, Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Fiss, the Supreme Court 1978 Term — Forward: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). Of particular concern here is the fact that the class claims are not individualized. A prisoner might prefer double celling to avoid isolation and yet be forced to single cell by decree. The conclusion is made that medical care is inadequate notwithstanding the fact that no single inmate can make out a claim that medical care was improperly denied, i.e., that individual rights were violated under the Eighth Amendment. Additionally, the role of the federal court as trier of fact, manager of the suit, and expounder of law introduces a greater risk of lack of objectivity and provides an opportunity for virtually unreviewable decrees.

identifies and remedies individual prison conditions which cause severe pain, its constitutional function terminates. Deleterious conditions which do not invoke the Eighth Amendment, like double celling and the lack of rehabilitation, can and should be left to be remedied by the political organs to which the constitution assigns the primary responsibility of administration.

Even under the broader standards currently in use, more restrictive remedies can and ought to be utilized.[19] The court in *Chapman* found a violation at S.O.C.F. under the totality of the circumstances and required the state to submit a plan which would, with reasonable dispatch, terminate double celling at the institution. *Chapman v. Rhodes, supra,* 434 F Supp at 1022. As a practical matter, such a plan requires Ohio to either construct a new facility or release prisoners. It is difficult to imagine a more intrusive remedy, or one more damaging to institutional integrity. The release of prisoners inflicts severe damage on the entire criminal justice system. It indiscriminately overrides the exercise of state court sentencing discretion, parole board decisions, and legislative sanctions for the commission of crimes.

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[19] *Rizzo v. Goode,* 423 U.S. 362, 379-80 (1976); *White v. Weiser,* 412 U.S. 783 (1973); *Nagel, supra; Robbins and Buser, supra; Tucker,* The Charles Street Jail Litigation: The Allowable Extent of Federal Judicial Involvement, 7 B.C. Env Aff L Rev 665 (1979). *Cf. United States v. New Mexico,* 438 U S 696 (1977).

A less intrusive alternative is available in this case and in most "totality of the circumstances" cases. Ohio should have been given the opportunity to formulate a plan which would have reduced impermissible conditions to a level that is consistent with constitutional mimimum standards. For example, the state should have been given the opportunity to submit a plan which would allow prisoners more time out of their cells and increase psychological and social work staffing, thereby reducing the conditions to a constitutionally acceptable level and avoiding the institutional distress caused by mandatory release of prisoners.

CONCLUSION

For the reasons stated above, amici urge the adoption of a traditional Eighth Amendment standard for measuring prison conditions. Under the standard, the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

JAMES M. BROWN
Attorney General of Oregon
JOHN R. McCULLOCH, JR.
Solicitor General
WILLIAM F. GARY
Deputy Solicitor General
JAMES E. MOUNTAIN, JR.
Assistant Attorney General
JAN PETER LONDAHL
Assistant Attorney General
Counsel for Amici

December 18, 1980

ADDENDUM:

The following states, in addition to those listed on the cover and in Appendix A, have joined in the brief.

State of Kansas
Robert T. Stephan
Attorney General of Kansas
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612

State of Kentucky
Steven L. Beshear
Attorney General of Commonwealth of Kentucky
State Capitol
Frankfort, Kentucky 40601

State of Oklahoma
Jan Eric Cartwright
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

State of Rhode Island and Providence Plantations
Dennis J. Roberts II
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

State of Utah
Robert B. Hansen
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

Government of the Virgin Islands
Ive Arlington Swan
Attorney General of the
Virgin Islands
Dept. of Law, P.O. Box 1074
St. Thomas, Virgin Islands 00801

APPENDIX: LIST OF THE AMICI CURIAE

State of Alaska
Wilson L. Condon
Attorney General of Alaska
Pouch KC-State Capitol
Juneau, Alaska 99811

State of Arizona
Bob Corbin
Attorney General of Arizona
State Capitol
Phoenix, Arizona 85007

State of Colorado
J. D. McFarlane
Attorney General of Colorado
1525 Sherman Street
Third Floor
Denver, Colorado 80203

State of Connecticut
Carl R. Ajello
Attorney General of
Connecticut
30 Trinity Street
Hartford, Connecticut 06106

State of Delaware
Richard S. Gebelien
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801

State of Florida
Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304

State of Hawaii
Wayne Minami
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

State of Idaho
David H. LeRoy
Attorney General of Idaho
State Capitol
Boise, Idaho 83720

State of Illinois
Tyrone C. Fahner
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

State of Indiana
Theodore L. Sendak
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

State of Minnesota
Warren R. Spannaus
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

State of Mississippi
Bill Alain
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

State of Missouri
John Ashcroft
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

State of Montana
Mike Greely
Attorney General of Montana
State Capitol
Helena, Montana 59601

State of Nebraska
Paul L. Douglas
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

State of Nevada
Richard H. Bryan
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

APPENDIX: LIST OF THE AMICI CURIAE—Continued

State of New Hampshire
Gregory H. Smith
Acting Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301

State of North Carolina
Rufus L. Edmisten
Attorney General of
North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

State of North Dakota
Allen I. Olson
Attorney General of
North Dakota
State Capitol
Bismark, North Dakota 58505

State of South Carolina
Daniel R. McLeod
Attorney General of
South Carolina
Wade Hampton Office Bldg.
Columbia, South Carolina
29211

State of South Dakota
Mark V. Meierhenry
Attorney General of
South Dakota
State Capitol
Pierre, South Dakota 57501

State of Tennessee
William M. Leech, Jr.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

State of Vermont
M. Jerome Diamond
Attorney General of Vermont
State Office Bldg.
Montpelier, Vermont 05602

State of Virginia
Marshall Coleman
Attorney General of Virginia
Supreme Court—
Library Building
Richmond, Virginia 23219

State of Washington
Slade Gordon
Attorney General of
Washington
Temple of Justice
Olympia, Washington 98504

State of West Virginia
Chauncey H. Browning, Jr.
Attorney General of
West Virginia
State Capitol
Charleston, W. Virginia 25305

State of Wisconsin
Bronson C. LaFollette
Attorney General of Wisconsin
Dept. of Justice,
State Capitol
Madison, Wisconsin 53702

State of Wyoming
John D. Troughton
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82202

No. 80-332

Supreme Court of the United States
OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PUBLIC HEALTH ASSOCIATION

JOHN A. KRICHBAUM
(Counsel of record)
WILLIAM P. ISELE
(of counsel)
AMERICAN MEDICAL ASSOCIATION
535 N. Dearborn Street
Chicago, Ill. 60610

DAVID A. SOLOMON
AMERICAN PUBLIC HEALTH ASSOCIATION
1015 15th Street N.W.
Washington, D.C. 20005

Attorneys for Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Supreme Court of the United States

No. 80-332

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PUBLIC HEALTH ASSOCIATION

The American Medical Association and the American Public Health Association respectfully move this Court for leave to file a brief *amicus curiae* in this case. We make this motion subsequent to seeking consent from Petitioner's attorneys. By letter dated January, 1981 such consent was refused.

IDENTIFICATION AND INTEREST OF THE AMICI AMERICAN MEDICAL ASSOCIATION

The American Medical Association (AMA) is the national professional association of physicians. Founded in 1846, the Association has a current membership of 231,000 physicians and serves as the representative of the medical profession in the United States and its Territories.

A sizeable portion of the Association's resources and efforts have been devoted through the years to the develop-

ment of programs and services that would meet the medical and social needs of all segments of the American population.

In 1972 the AMA conducted a nationwide survey of local jails which revealed the difficulties of providing adequate medical care and health services in jails. In 1973 the AMA appointed a National Advisory Committee composed of experienced medical and correctional representatives to assist in developing a program to improve medical care and health services in correctional institutions.

As a result of that Committee's efforts, the Association in 1974 in conjunction with the Law Enforcement Assistance Administration (LEAA), an agency of the U.S. Department of Justice, began the AMA program to improve medical care and health services in correctional institutions.

The AMA Jail Project was originally and still is aimed primarily at improving medical care and health services for persons held in jails through the development of minimum standards and a subsequent voluntary jail health services accreditation program.

In 1978, the AMA entered into a subcontract with the Michigan Department of Corrections under a separate LEAA grant to develop Standards for Health Services in Prisons, to assist in the training of correctional administrators and health care personnel, and to develop and test an accreditation instrument for prison health care systems.

Through an award of accreditation, the AMA and the respective state medical society recognize that a particular facility has met nationally recognized minimum standards designed to promote adequate health care. Support for these standards has come from both medical organizations and organizations concerned with law enforcement in the

public interest, such as the American Bar Association, the American Correctional Association, and the National Sheriffs Association, all of which have been involved in the program from its outset.

In late 1978 the Comptroller General of the United States recommended to the Attorney General of the United States that a federal strategy be developed and implemented to bring correctional health care nationwide into compliance with the *AMA Standards.* Governmental bodies in eight states[1] have incorporated the *AMA Standards,* in whole or in part into statutes and regulations governing correctional facilities. At least two federal courts have approved consent decrees requiring that correctional institutions bring themselves into compliance with the *AMA Standards. Brown* v. *Beck,* slip. opinion at 6, Civil Action No. 177-56 (S.D. Ga., Augusta Div. May 2, 1978) [Richmond County Jail] see reference at 481 F.Supp. 723 (S.D. Ga. January 9, 1980); *Burnim* v. *Bell,* Plan for Compliance at 4, Civil Action No. C-77-453 (W.D. Wash. June 12, 1979) [King County Jail Correctional Facilities.] In addition, *AMA Standards* were cited favorably in *Ahrens* v. *Thomas,* 434 F.Supp. 873 at 888 (S.D. Mo. 1977), *aff'd,* 570 F.2d 286 (8th Cir. 1978).

The AMA's focus on the health care of prisoners has over the years caused us to become increasingly concerned over environmental factors such as overcrowding which have a demonstrable adverse impact on the health status of inmates. From its experience in dealing with the health needs of inmates, and its concern for the prevention of disease and the maintenance of health in all segments of the American population, the AMA seeks to bring to this Court's attention the adverse consequences of long term overcrowding on inmates' physical and mental health.

[1]California, Maryland, Michigan, Ohio, Oklahoma, South Carolina, Texas, and Washington.

AMERICAN PUBLIC HEALTH ASSOCIATION

The American Public Health Association is a non-profit corporation, organized in 1872, consisting of over 30,000 members nationwide. Its object is to protect and promote personal and environmental health. The organization has a large and diverse membership including directors and top level officials in state and local health departments, professors and administrators of schools of public health, and high ranking officials in various federal agencies. Within this membership both professional health workers and consumers act in a leadership role to develop a national policy for the provision of equitable and quality health care for all citizens. The health of those who are incarcerated has been a major area of interest and concern to the Association for many years.

The APHA is vitally concerned with the issue of prison overcrowding because of the demonstrable adverse effects of overcrowding on physical and mental health. In pursuing its goals the APHA has addressed this issue by promulgating public health standards for prisons which include minimum space per person standards. These call for the use of single cells with a minimum of 60 square feet per person.[2]

The Association bases its standards upon the substantial body of empirical findings in the fields of medicine, psychology, psychiatry and epidemiology, that forced long term crowding produces physical and mental injury.

Those prison standards were developed beginning in 1972 by a task force of fifty persons drawn from the health professions. The standards were based upon several overriding principles; foremost among those was the "intent of the American Public Health Association . . . not to promote special treatment for this population but rather to insure that their incarceration does not compromise their

[2]*Standards for Health Services in Correctional Institutions: American Public Health Association* (1976) § VI(3).

health care . . ."[3] Secondly, the standards are not goals which are simply desirable, but are set forth as the minima required to safeguard physical and mental health.

The standards of the APHA have been cited with approval by numerous experts and federal courts in formulating remedies for unconstitutional prison conditions. See *Battle* v. *Anderson,* 564 F.2d 288, 395 (10th Cir. 1977) [Oklahoma State Penitentiary]; *Ramos* v. *Lamm,* 485 F.Supp. 122, 154 (D. Colo. 1979), *aff'd in relevant part, reversed and remanded in part* (10th Cir. 1980), [Colorado State Penitentiary]; *Palmigiano* v. *Garrahy,* 443 F.Supp. 956, 961, 990 (D.R.I. 1977) [Rhode Island Adult Correctional Institutions]; *Ruiz* v. *Estelle,* slip op. at 16, no. 21, Civ. Action No. H-78-987 (S.D. Texas, Houston Div., Dec. 10, 1980) [all Texas Department of Corrections institutions].

In view of the Association's expertise in the field of public health and its long term commitment to the development of standards that protect the physical and mental health of incarcerated persons the Association seeks to bring to the Court's attentions the health implications of long term overcrowding, and the empirical basis for the sixty (60) square feet per person standard.

Respectfully submitted,

JOHN A. KRICHBAUM
(Counsel of record)
WILLIAM P. ISELE
(of counsel)
AMERICAN MEDICAL
ASSOCIATION
535 N. Dearborn Street
Chicago, Ill. 60610

DAVID A. SOLOMON
AMERICAN PUBLIC HEALTH
ASSOCIATION
1015 15th Street
Washington, D.C. 20005

Attorneys for Amici Curiae

[3] *Id.* at *vii.*

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-332

JAMES A. RHODES, et al.,
Petitioners,

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**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PUBLIC HEALTH ASSOCIATION

SUMMARY OF ARGUMENT AND

STATEMENT OF THE CASE

The district court derived its holding that the long term overcrowding at the Southern Ohio Correctional Facility violated the Eighth Amendment from a careful review of the totality of conditions at the prison. The holding was based upon a finding that, on the facts taken as a whole, the sustained overcrowding needlessly caused physical and mental harm to the prisoners, *Chapman* v. *Rhodes,* 434 F. Supp. at 1020, and violated contemporary standards of decency as reflected in the standards of various professional organizations. 434 F. Supp at 1021.

PREVIOUS PAGE WAS BLANK

This Court's historic solicitude for the values protected by the Eighth Amendment has focussed on the significance of the "contemporary standards of decency" embodied in that Amendment. *Estelle* v. *Gamble,* 429 U.S. 97, 103 (1976). In filling in the content of those standards of decency this Court has looked to the standards of professional organizations. *Estelle* v. *Gamble,* 429 U.S. at 103, n. 8; *Hutto* v. *Finney,* 437 U.S. 678, 683 (1978).

In the context of overcrowding, the minimum space per person standards developed by the APHA and other professional organizations such as the U.S. Army, the American Correctional Association, the U.S. Department of Justice, and the National Sheriffs Association, are not simply desirable goals, but are minima required to safeguard physical and mental health. These standards which generally call for at least 60 square feet of space per person are based upon the broad consensus of epidemiological, medical and psychological findings that long term overcrowding causes and accelerates the spread of communicable disease and results in the increased occurrence of stress-induced mental disorders, tension, aggression and physical violence.

The district court's opinion properly recognized that the standards of professional organizations were an important source to consider in assessing the contemporary standards of decency. And the court correctly held, based on the record as a whole and the work of behavioral scientists, and public health officials, that minimum space requirements are necessary to prevent the needless infliction of mental and physical injury caused by long term overcrowding.

RELEVANT CONSTITUTIONAL PROVISION

United States Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARGUMENT

I. THE MINIMUM SPACE PER PERSON STANDARDS HAVE BEEN DEVELOPED TO PROMOTE THE DECENT TREATMENT OF PRISONERS BY MINIMIZING THE ADVERSE EFFECTS OF OVERCROWDING ON THEIR PHYSICAL AND MENTAL HEALTH.

Crowding both in and out of prison is of enormous concern to public health officials and behavioral scientists because of its significance as a factor directly affecting mental and physical health.[1] In 1938, the APHA first promulgated its standard of 70 square feet per person for sleeping purposes for residential housing of free world persons. This standard was reaffirmed in 1945 and has remained the same to this date.

In the correctional field the APHA, working in conjunction with correctional officials, promulgated a standard of 60 square feet per prisoner in a cell (with a minimum eight foot ceiling and 500 cubic feet per person).[2] This standard is based upon

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[1]Crowding is often used to refer either to an increase in spatial density (a reduced square footage per person) or an increase in social density (an increased number of persons in a given space). The adverse effects of crowding generally are more pronounced when social density is increased – that is, when more people are forced together, even if the square footage per person remains the same. In other words, from a public health viewpoint, it is better to have one person in a 50 square foot cell than two persons in a 100 square foot cell. Thus, double celling two persons in a 60 square foot cell constitutes not only an increase in spatial density but a marked increase in social density as well.

[2]*Standards for Health Services in Correctional Institutions: American Public Health Association* (1976): APHA Space Requirements are as follows: *"Principle:* Adequate space should be provided for cells, dormitories, dining rooms, recreation areas, visiting areas, and any other places where inmates sleep, live, work or play. *Public Health Rationale:* Adequate space is necessary to reduce stress, carry out certain tasks, provide for privacy where and when indicated, and contribute to comfort and mental health. *Satisfactory Compliance:* Sufficient space shall be provided to make use of the room or area as intended without crowding, confusion or conflict. Cells shall

substantial empirical data demonstrating the profound physical and mental injury that can result from sustained crowding. Other professional organizations likewise recognize that minimum space requirements are essential to maintain mental and physical health[3] The U.S. Army has adopted a 72 square foot standard;[4] the British Army[5] and the Canadian Army[6] have adopted a 60 square foot standard.

U.S. Army regulations prescribe 72 square feet of space per enlisted man, exclusive of stairs, halls, utility space, latrines, and similar facilities. Regulations authorize exceptions to be made only by the Department of the Army.

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be designed for the use of one inmate; dormitories are discouraged as are double deck bunks. Single cells shall provide a minimum of 60 sq. ft., 8 ft. ceiling, and 500 cu. ft. per person, and where dormitories are permitted, a minimum of 75 sq. ft., 10 ft. ceiling, and 600 cu. ft. per person. Day rooms shall provide space equal to at least 50 percent of the cells and dormitories; dining areas 9 to 12 sq. ft. per inmate. . . ."

[3]See Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional Institutions* § 4142 (1977) ["There is one inmate per room or cell, which has a floor area of at least 60 square feet, provided inmates spend no more than 10 hours per day locked in, exclusive of counts; when confinement exceeds 10 hours per day, there are at least 80 square feet of floor space]; U.S. Department of Justice, *Federal Standards for Prisons and Jails*, §§ 2.02, 2.04, 2.05 (1980) ["In *long term institutions,* there is one inmate per cell or room. . . Single rooms or cells have at least 60 square feet of floor space. Where an inmate is required to spend more than 10 hours per day in the room or cell there are at least. . . 80 square feet in *long term institutions.* National Sheriffs' Association, *A Handbook on Jail Architecture* 63 (1975) ["Single occupancy detention room should average 70 to 80 square feet in area."] All of these minimum space standards assume that other minimum standards, e.g. for sanitation, lighting, ventilation, medical, and psychiatric care are being met.

[4]Army Regulations 210-16 (1975).

[5]*Handbook of Army Health* (1950) (W.O. Code No. 5961 26/Pubs/6333, Mar. Office, Great Britain.)

[6]Report to the Secretary of the [U.S.] Army Concerning Medical Implications of Space Allowances in Troop Housing" (April 1952) [hereinafter cited as "Medical Implications of Space Allowances"].

> It is accepted without question that such exceptions are command decisions to meet emergency circumstances and that a recognized calculated risk is being taken when such decisions are made. *Under conditions of rapid expansion or total mobilization a minimum of 60 square feet has been agreed upon. The Surgeon General supports these criteria. For medical reasons they are the lowest which may be used without unnecessary risk of abnormal disease incidence.*[7] (emphasis added)

While the Army does not prohibit double bunking *per se,* for health reasons it is permissible only where "the space provided for each man meets the requirement of 72 square feet. . . ."[8]

U.S. Army Regulations for military prisoners similarly call for a standard space allocation of 72 square feet of sleeping space for each prisoner.[9] A reduced allocation of 55 square feet is authorized only when "priority conditions exist that preclude the use of standard allocations.[10] Under emergency conditions a lower standard is allowed but only for seven days:[11]

> Under conditions of temporary peak confinement facility population periods, not to exceed *seven consecutive days,* an *emergency minimum allocation* of 40 square feet of sleeping space per prisoner is authorized, excluding close confinement.

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[7] *Id.* Incl. 1, at 2-3. The same public health rationale applies where prisoners are placed in close proximity for extended periods of time because of overcrowding.

[8] *Id.* at Incl. 1, p. 3.

[9] Army Regulation 190-47 § 3-3(a) (1975).

[10] Army Regulation 190-47 § 3-3(b) (1975).

[11] Army Regulation 190-47 § 3-3(b) (1975). The only exception to these regulations is for inmates in close confinement (segregation). These are single cells of 48 square feet, A.R. 190-47 § 3-1(b), and confinement shall generally not exceed 15 days, A.R. 190-47 § 9-16(d) (1975).

Commanders must be prepared to accept the possible increased incidence of respiratory disease and disciplinary problems under these conditions. (emphasis added)

A. The Minimum Space Per Person Standards Are Based Upon Empirical Medical, Psychological, And Epidemiological Findings That Mental And Physical Injury Are Caused By Sustained Crowding In Prisons And Other Institutions.

The significance of the square footage standards promulgated by the APHA, the U.S. Army and other organizations is that they are *not* intuitive, normative, or idealistic notions. On the contrary, the standards represent the broad consensus of public health experts and behavioral scientists based upon empirical findings in the fields of medicine, psychology and epidemiology that sustained crowding, especially under adverse conditions in closed institutions, causes demonstrable mental and physical injury and that such standards represent a minimum necessary to maintain mental and physical health.[12]

Before outlining the effects of crowding, it must be emphasized that prolonged crowding in prisons or other closed institutions is significantly different from the short-term crowding experienced by commuters, or those riding in an elevator. Most investigations indicate that crowding is reasonably well tolerated for short periods, especially when an individual has the power to terminate confinement or sees a finite limit to this condition. It

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[12]Walker, Jr., B., & Gordon, T., "Health and High Density Confinement in Jails and Prisons", *Federal Probation*, March 1980, at 153-58. [hereinafter cited as "Health and High Density Confinement"] It should be noted that correctional officials have not found that these minimum space standards conflict with their needs. See note 3, *supra*.

is also true that feelings of strong personal-social identity and a sense of belonging may neutralize the impact of the crowding.[13]

Crowding in prisons, however, is an entirely different matter. As researchers have found, long term crowding in prison must be viewed in light of the circumstances inherent in forced confinement – the crowding is prolonged, intense, inescapable, with strangers, and often under adverse conditions.[14] It is under these circumstances that the inquiry as to the effects of crowding must be undertaken. Thus, the effects of overcrowding on prisoners cannot be evaluated in a vacuum, but require analysis of the totality of circumstances and conditions.

B. Long Term Overcrowding Causes Increased Levels Of Physical Illness And Disease.

It is a well established principle of public health that long term high density confinement results in higher levels of communicable disease and illness. The broad consensus of medical judgment is opposed to prolonged close confinement because of the "danger of [the] spread of acute infectious diseases. . . ."[15]

As a result of research into the causes of and distribution of disease, it is now known that the common respiratory diseases, influenza, the streptococcal diseases, and the pneumonias are

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[13]Clements, C., "Crowded Prisons: A Review of Psychological and Environmental Effects", 3 *Law and Human Behavior* 217 (1979) [hereinafter cited as "Crowded Prisions"].

[14]*Id.* at 220.

Cox, V.C., Paulus, P.B., McCain, G. & Schkade, J.K., "Field Research on the Effects of Crowding in Prisons and on Offshore Drilling Platforms", in *Residential Crowding and Design* (1979) [hereinafter cited as "Effects of Crowding in Prisons"].

Sundstrom, Eric, "Crowding as a Sequential Process: Review of Research on the Effects of Population Density on Humans", *in Human Response to Crowding* 31, 33, 52, 67 (1978).

[15]"Medical Implications of Space Allowances", supra note 6 at 2.

spread through person to person contact, or by articles soiled by discharges from the nose and mouth, or discharges into the air by breathing, coughing, sneezing, spitting, or even talking.[16] The closer the range the greater the probability of the organism being deposited on another person; conversely increasing the space between individuals decreases that probability.[17]

Concern about the medical ramifications of crowding was evident as early as World War I when the Secretary of War appointed a Medical Board consisting of the Surgeon General and other doctors of international reputation to examine the housing plans for the U.S. Army. The Medical Board found that:

> Septic pneumonia was practically uncontrollable when men are too closely crowded. The same, no doubt, is true of other respiratory diseases to a greater or lesser extent. The most serious of these are cerebral spinal meningitis, pneumonia, tuberculosis, measles, mumps, scarlet fever and whooping cough. All of these are transmitted by direct contact and the degree of transmission is inversely in proportion to the distance between individuals.[18]

The Board recommended to the Secretary of the Army: ". . .that the cubic air space per man be increased to 500 lcubic feet; . . . . We believe that no sanitary advice is sound which does not provide for at least 500 feet of air space per man.[19]

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[16]Riley, R.L., "Airborne Infection", 57 *The American Journal of Medicine* 466-75 (1974).

"Health and High Density Confinement", *supra* note 12.

[17]*Id.*

[18]"Medical Implications of Space Allowances", *supra* nota 6. Encl. 2: Extracts from Report of Medical Board on Housing plans, Appointed by the Secretary of War, June 12, 1917.

[19]*Id.* 500 cubic feet is approximately 60 square feet of floor space with an 8 foot ceiling.

In World War II the Army Epidemiological Board transmitted a special resolution to the Secretary of the Army:[20]

> It can be positively stated that the greater the crowding the greater is the risk of an epidemic of serious proportions.
> The Board indorses the action of the Surgeon General in reiterating the desirability of restricting crowding to that level produced by the allotment of sixty (60) square feet per man.

Again in 1952 the Armed Forces Epidemiological Control Board (successor to the Army Epidemiological Board) was asked to review its position on the space allowance of 60 square feet per person. The views of the Board were stated by Dr. Colin MacLeod of New York University Medical School and President of the Board:[21]

> The recommendations of the Epidemiological Board in January 1943 called attention strongly to the danger of crowding as an important factor in increasing the spread of diseases transmitted by way of the respiratory tract. The statements are as true today as when they were made in 1943. It is strongly urged that the principles laid down then be followed in any plan for housing of our troops.
>
> While the dangers are greatest with respect to the respiratory diseases, it should also be emphasized that the overloading of general facilities incident to crowding in barracks also increases the danger of spread of diseases transmitted by other routes, especially the gastro-intestinal diseases.

Prison and other forms of institutional crowding also have been shown to be positively related to an increased incidence of

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[20]"Medical Implications of Space Allowances" *supra* note 6, at Encl. 1, page 3.

[21]*Id.* at Exhibit B.

communicable disease.[22] Millar and Alexander report that an epidemic of meningococcal disease (10,000 recruits) at the U.S. Naval Training Center in San Diego, California in 1963 was enhanced by overcrowded facilities. At the time of the outbreak, the available space in the residential units was about twenty-five (25) square feet per sailor, which was less than half the minimum amount of space prescribed by the Bureau of Medicine and Surgery of the U.S. Navy. After the population was reduced to provide 55-60 square feet per person, no new cases of the disease were reported.[23]

Prison overcrowding also accelerates the development and spread of such potentially fatal diseases as pulmonary tuberculosis.

> The population of a large city prison is an ideal seed bed for tuberculosis. The prison inmates live under continuous mental stress, frequently in overcrowded, and poorly ventilated quarters in close contact with each other.[24]

A rate of tuberculosis among inmates in an overcrowded Arkansas prison 6.5 times greater than in the general population has been documented.[25] The same study reported that half of the inmates found to have tuberculosis from 1975 to 1977 had entered the prison uninfected, and that infected former inmates were a significant source of infection for the community at large.

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[22]Annual Report, Commission on Acute Respiratory Disease. Armed Forces Epidemiological Board. Washington, D.C. (1951-1952).

[23]Millar, J.W. & Alexander, C.E., "Epidemiology of Meningococcal Disease," in *Proceedings of the First Symposium on Aerobiology* (1963). [meningitis is an infection of the membranes (the meninges) that cover and protect the brain and spinal cord]

[24]Abeles, H. & Fiebes, M.E., "The Large City Prison: A Reservoir of Tuberculosis", 101 *American Review of Respiratory Disease* 706-09 (1970).

[25]Stead, W.W., "Undetected Tuberculosis in Prison" 240 *Journal of the American Medical Association* 2544-2547 (1978).

King and Geis[26] have reported on the influence of crowding on the transmission of tuberculosis on a tier of the Cook County (Illinois) jail. They found that following diagnosis of advanced tuberculosis on one inmate, 23% of the exposed inmates were reported to be tuberculin positive. Three months later 71% of the inmates were reported to be tuberculin positive, indicating exposure of the crowded tier population to the disease.

In addition to the well documented fact that overcrowding encourages disease transmission, [27] disease rates are also higher because the stress induced by crowding tends to increase susceptibility to disease.[28] The National Academy of Sciences reports that the social stresses caused by crowding produce physiological disturbances that in turn decrease resistance to disease.[29]

The spread of communicable disease in prisons assumes even greater importance in view of the fact that there is a very high incidence of communicable disease among inmates entering our correctional institutions. The American Medical Association found that of some 641 prisons examined in 1976 positive laboratory results for tuberculosis were found in 12.4%; for

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[26]King, L., & Geis, G., "Tuberculosis Transmission in a Large Urban Jail" 237 *Journal of the American Medical Association* 790-93 (1977).

[27]Studies by Walker and Gordon, public health experts, of several outbreaks of epidemics in jails and prisons indicate that infectious diseases and symptoms such as diarrhea, dysentery, etc. are often traceable to overtaxed and unsanitary food service and/or plumbing defects caused in part by the burden placed on toilet and bathroom fixtures when the institution exceeds the capacity for which it was designed. "Health and High Density Confinement in Jails and Prisons', *supra* note 12, at 57.

[28]Rogers, M., Devandra, D. & Reich, P., "The Influence of the Psyche and the Brain on the Immunity and Disease Susceptibility – A Critical Review," *Psychosomatic Medicine* 41, 147-164 (1979).

[29]National Academy of Sciences, *Rapid Population Growth* (1971).

syphillis in 5.9% and for hepatitis in 30%.[30] Such diseases are serious, highly infectious, and if untreated could be rapidly transmitted to other inmates, especially under conditions of overcrowding.

C. Long Term Overcrowding Causes Increased Rates of Stress and Mental Disorders

While many environmental factors cause stress under certain conditions, and any given factor is not uniformly stress inducing, long term crowding in a prison setting has generally been found to be a profound streess inducer.

In a recent nationwide, systematic study of the effects of prison crowding on inmate behavior, sponsored by the U.S. Law Enforcement Assistance Administration, the researchers concluded:[31]

> high degrees of sustained crowding have a wide variety of negative psychological and physiological effects including increased illness complaint rates, higher death and suicide rates, and higher disciplinary infraction rates. . .
>
> increases in inmate population without concomittant increases in housing facilities produce a number of

[30]Anno, B.J., *Analysis of Inmate/Patient Profile Data* at 107 (1977); King, L., *Management of Common Medical Problems in Correctional Institutions* (1979) (American Medical Association Program to Improve Medical Care in Correctional Institutions). ["It is estimated that 7% of the total U.S. population are infected with tubercule bacillus. In contrast, reported percentages of tuberculin skin test positive individuals in correctional institutions include 15% in Cook County Jail, 16% in New Orleans Parish Prison, and 26% in one Arkansas prison."]

[31]McCain, G., Cox, V.C., & Paulus, P.B., *The Effect of Prison Crowding on Inmate Behavior; Final Report* 1, 117 (1980). (LEAA Grant 78-NI-AX-0019) [hereinafter cited as "The Effect of Prison Crowding"].

> very undesirable effects as indicated by disproportionate increases in disciplinary infraction rates, suicide rates[32] rates of death by violence, and death rates of inmates over 50.

It must be noted that the prisoners in the institutions studied were confined to their cells only during sleeping hours.[33] It is not unreasonable to assume that the stress related effects of crowding would be even more pronounced when prisoners are confined to their cells for a large portion of their waking hours.

Two other researchers in reviewing the evidence on the effects of crowding likewise concluded:[34]

> Crowding has a substantial negative effect on a variety of aspects of mental health.

They found that crowding causes increased psychiatric symptoms, a lack of positive affect, nervous breakdowns, alienation and low self-esteem.[35]

Crowding has also been found to cause stress related disease.[36] These stress related conditions are evidenced

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[32]The researchers' study of the Texas Department of Corrections indicated that increased crowding was accompanied by a "dramatic increase in suicide rates." Over the fourteen year period from 1964 to 1978 the prision population increased 91%, while suicide rates increased over 1000%. *Id.* at 104.

[33]*Id.* at 143.

[34]Galle, E.R. & Gove, W.R., "Overcrowding, Isolation and Human Behavior: Exploring the Extremes in Population Distribution", *Social Demography* 95, 116-17 (1978).

[35]*Id.*

[36]Gove, W.R. Hughes, M., & Galle, O.R., "Overcrowding in the Home: An Empirical Investigation of its Possible Pathological Consequences", 44 *American Sociological Review* 59, 74 (1979).

Booth, A. & Cowell, J., "The Effects of Crowding Upon Health", 17 *Journal of Health and Social Behavior* 204, 216 (1976).

physiologically by elevated blood pressure,[37] and increased sweating.[38] Double celled prisoners also showed consistently and significantly higher illness complaint rates than single celled prisoners, another indication of high levels of stress.[39]

It also appears that prisoners do not adapt to crowding;[40] over time tolerance to crowding actually decreases and the need for personal space increases.[41]

Crowding is believed to be stress inducing for several reasons:

1. Crowding necessarily reduces a person's ability to control his personal space and the environment around him.[42]
2. Crowding decreases a person's ability to control social interaction and thereby induces feelings of helplessness, depression and deterioration in health.[43]

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[37]D'Atri, D.A. & Ostfeld, A.M., "Crowding: Its Effects on the Elevation of Blood Pressure in a Prison Setting", *Preventive Medicine* 1975, at 550 [hereinafter cited as "Crowding: Its Effect on the Elevation of Blood Pressure"].

[38]"Effects of Crowding in Prisons", *supra* note 14.

[39]"The Effect of Prison Crowding", *supra* note 31.

[40]*Id.* at 136.

[41]"Effects of Crowding in Prisons", *supra* 14.

[42]Sommer, R., *Personal Space: The Behavioral Basis of Design* (1969);

Schmidt, D.E. & Keating, J.P., "Human Crowding and Personal Control: An Integration of the Research," 86 *Psychological Bulletin,* 680, 686, 691 (1979) [hereinafter cited as "Human Crowding and Personal Control"].

[43]Baron, R.M. & Rodin, J., "Personal Control and Crowding Stress: Processes Mediating the Impact of Spatial and Social Density", in *Advances in Environmental Psychology* (1978).

Baum, A., & Valins, S., *Architecture and Social Behavior: Psychological Studies in Social Density* (1977).

"Human Crowding and Personal Control", *supra* note 42 at 602.

3. Crowding induces a fear-reaction produced by too many strange "others" in confined areas.[44]

4. Crowding leads to suppressed hostility, which in turn causes higher elevations of blood pressure.[45]

Other studies have indicated that crowding stress is much more likely to occur, and to be more pronounced where crowding is present under conditions of threats to personal security, when resources are scarce, when the environment is "closed" and when large amounts of time must be spent in the crowded setting.[46] Unfortunately, it is in an overcrowded prison where all of these stress inducing factors are often found. Hence the level of stress caused by sustained prison crowding tends to be very high.

The mental health of prisoners is likely to be seriously jeopardized by such prolonged overcrowding. It is all too often a fact of prison life that prisoners with identified psychological disturbances are often confined to their cells without care or treatment for 22 to 24 hours per day simply for safekeeping.[47]

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[44]Paulus, P.B., "Crowding", in P.B. Paulus (Ed.), *Psychology of Group Influence* (1980).

[45]D'Atri, D.A., "Psychophysiological Response to Crowding", *Environment and Behavior* 7, 237-52 (1975).

"Crowding: Its Effect on the Elevation of Blood Pressure" *supra* note 37, at 550-55, 566 (1975).

[46]Schopler, Jr. & Stokols, D., *A Psychological Approach to Human Crowding* (1976).

"Crowded Prisons", *supra* note 13, at 220.

[47]"Crowded Prisons", *supra* note 13, at 221-2;

Pugh v. Locke, 406 F.Supp, 318, 324 (M.D. Ala. 1976), aff'd, *Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), cert. denied *Alabama v. Pugh,* 438 U.S. 781 (1978).

Comptroller General of the United States, *Jail Inmates Mental Health Care Neglected; State and Federal Attention Needed* (1980).

Comptroller General of the United States, *Prison Mental Health Care Can be Improved by Better Management and More Effective Federal Aid"* (1979).

Prisoners who are psychotic, suicidal, and otherwise disturbed, often find that their problems are ignored because of the pressures on available staff who have to spread themselves more thinly among the increased population. Some prisoners will respond to this overcrowding by passive withdrawal, others by aggressive acting out—both habitual response patterns that may be destructive to the personality.[48]

Thus, prison crowding not only increases stress related pathology, but undermines efforts to treat psychological problems. Too few staff are available to identify, much less adequately serve those prisoners who need counseling or more intensive forms of psychological treatment.

D. Prolonged Overcrowding Leads To Increased Rates of Aggressive and Violent Behavior.

The increased stress, tension, fear, anxiety and hostility created by crowding finds an outlet in several ways. Some prisoners will try to "escape" from a stressful, constantly intrusive situation by emotional withdrawal, apathy, and resignation.[49] However, others will try to stake out a personal territory in a more aggressive manner and may form protective groups or cliques to defend their "turf", leading to group as well as one-on-one confrontations.[50]

That the stress caused by overcrowding leads to an increase in aggressive behavior, an increase in the level of prison violence,

Wilson, Rob, "Who Will Care for the 'Mad and Bad'", 5, 6, *Corrections Magazine* (1980).

[48]"Crowded Prisons", *supra* note 13, at 222.

[49]*Id.* at 223.

[50]*Id.* See also Ibrahim, A.I., "Deviant Sexual Behavior in Men's Prisons," *Crime and Delinquency* 38, 42 (1974) ["Prison overcrowding expedites the formation of cliques or gangs . . . with the old timers taking advantage of the newcomers, especially through sexual exploitation. It is extremely difficult for administrators and guards to keep an eye on what goes on in these crowded cells. . ."]

including rape, extortion, assault and murder, and ultimately to prison riots, is a social fact acknowledged by behavioral scientists, correctional officials, and the courts.

A well known psychologist, Edwin I. Megargee, concluded from a study of several prisons:[51]

> In a prison setting where crowded conditions are chronic rather than temporary, and where people prone to antisocial behavior are gathered together, there is a clear association between restrictions on personal space and the *occurrence of disruptive and aggressive behavior.* (emphasis added)

These findings have been confirmed in several other studies. As crowding heightens the frequency of interpersonal friction, and as available space decreases, disruptive behavior in prison increases. Given the inability to perform other coping responses, such as constructive activities, aggression becomes a more likely strategy.[52]

Nacci, Teitelbaum and Prather[53] (1977) researchers for the U.S. Bureau of Prisons, surveyed all of the federal correctional institutions and concluded that there were "very dangerous side effects" caused by overcrowding. Their data indicated that those prisons that were most overcrowded relative to their capacity had the highest disciplinary infraction rates (high rates of assaultiveness), especially institutions housing young offenders.

McCain, Cox and Paulus[54] also found in their studies of federal prisons and six state prisons, that high degrees of sustained crowding consistently resulted in higher disciplinary in-

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[51]Megargee, Edwin I. "Population Density and Disruptive Behavior in a Prison Setting", in *Prison Violence* (1976).

[52]"Crowded Prisons, *supra* note 13, at 223.

[53]Nacci, P.L., Teitelbaum, H.E., & Prather, J., "Population Density and Inmate Misconduct Rates in the Federal Prison System." *Federal Probation* 26-31 (1977).

[54]"The Effect of Prison Crowding", *supra* note 31, at 117, 19.

fraction rates. Double celled prisoners had significantly higher rates of institutional rule violations than single celled inmates, indicating greater adjustment problems.

Correctional experts concur that overcrowding increases tension and leads to violence.[55] See also Commission on Accreditation for Corrections, *Manual of Standards for Adult Correctional* Institutions, § 4142 (1977).

Overcrowding has been cited as one of the major causes of the Attica uprising.[56] And recently the Attorney General of the State of New Mexico, in a report on the New Mexico prison riot of February 2 and 3, 1980, stated that the long term overcrowding was one of the principal underlying causes of that tragic episode.[57]

The courts have also recognized the direct link between overcrowding and violence. *Battle* v. *Anderson,* 564 F.2d 388, 395 (10th Cir. 1977) ["There is a direct correlation between overcrowding and violence. . . . Defendants acknowledge that the 1973 McAlester riot was caused by the then existing overcrowded conditions"], *Newman* v. *Alabama,* 559 F.2d 283, (5th Cir. 1977) ["The State concedes. . . that the overcrowding was primarily responsible for and exacerbated all the other ills of the penal systm."]; *Campbell* v. *McGruder,* 580 F.2d 521, 536 n. 27 (D.C. Cir. 1978) ["these and other courts have recognized that overcrowding and double celling are often prime causes of

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[55]National Advisory Commission on Criminal Justice Standards and Goals, Washington, D.C., 35 (1973). ["Overcrowding exacerbates health hazards and also contributes to tensions."]

[56]State of New York, Department of Correctional Services, *Strategic Plan,* 1980-1985 (1980).

[57]*Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico* 1, 8 (1980). [Throughout its history, the Penitentiary of New Mexico has suffered from neglect. . . Lack of space, adequate programming, and understaffing have all been part of the prison's tradition. . . (The) dramatic increase of 200 inmates in the three months prior to the riot. . . undoubtedly added to the high level of tension. . .", pp. 1, 8]

the tension, sexual assaults, . . . that characterize so many jails and prisons."] *William* v. *Edwards,* 547 F.2d 1206, 1211 (5th Cir. 1977)

The physical and mental harms caused by overcrowding are exacerbated by conditions of forced idleness – that is, when prisoners have few constructive jobs, programs or outlets for their energies. The absence of meaningful work, education and vocational programs, recreation and cultural/social resources "fosters a lowering of self-esteem, loss of skills, and inevitable institutionalization."[58] As the American Correctional Association has acknowledged, "If the prisoners, are committed to inactivity. . . and mental stultification, then the desire within them to escape or to throw off the shackles of these unnatural restraints will become so strong that security facilities and procedures will be breached sooner or later."[59] Ironically, while forced idleness aggravates the effects of the overcrowding, the overcrowding itself in turn increases the level of idleness by diluting resources and programs.

II. THE FINDINGS OF THE DISTRICT COURT IN THIS CASE THAT PROLONGED OVERCROWDING, UNDER THE TOTALITY OF CONDITIONS OF CONFINEMENT AT THE S.O.C.F., WHERE TWO MEN WERE FORCED TO SHARE A 63 SQUARE FOOT CELL FOR MOST OF THE DAY FOR LONG PERIODS OF TIME, AND WHERE SUCH OVERCROWDING PRODUCED MENTAL AND PHYSICAL INJURY VIOLATED CONTEMPORARY STANDARDS OF DECENCY REQUIRED BY THE EIGHTH AMENDMENT SHOULD BE AFFIRMED.

This court held in *Estelle* v. *Gamble,* 429 U.S. 97, 103 (1976) and *Hutto* v. *Finney,* 437 U.S. 678 (1975), that the prohibition against cruel and unusual punishment embodies ". . .civilized

[58]"Crowded Prisons", *supra* note 13, at 222.

[59]American Correctional Association, *Manual of Correctional Standards* 366 (1966).

standards, humanity and decency. . . ." and includes the right to be free from those punishments which are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'" citing *Trop* v. *Dulles,* 356 U.S. 86, 100-101 (1958). The Eighth Amendment protects a prisoner from penal measures which involve the "infliction of unnecessary suffering [as to be] inconsistent with contemporary standards of decency." *Estelle* v. *Gamble,* 429 U.S. at 103. See also, *Gregg* v. *Georgia,* 428 U.S. 153, 173 (1976) ["purposeless and needless imposition of pain and suffering"].

To ascertain the content of the Eighth Amendment's "evolving standards of decency" this Court and the lower courts have been guided by statutes and minimum standards developed by professional organizations such as the APHA.[60] In *Estelle* v. *Gamble,* 429 U.S. at 103-4, n.8, the Court relied in part upon standards of the National Advisory Commission on Criminal Justice Standards and Goals, The National Sheriffs' Association (Standards for Inmates' Legal Rights, and the United Nation's Congress on Prevention of Crime and Treatment of Prisoners). In *Hutto* v. *Finney,* 437 U.S. at 683, the Court cited the standars of the National Academy of Sciences in assessing the adequacy of the diet provided to prisoners in Arkansas' isolation cells. Other courts have also looked to such standards, including APHA standards, to ascertain whether contemporary standards of decency have been met. *Battle* v. *Anderson, supra,* 564 F.2d

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[60]In *Bell* v. *Wolfish,* 441 U.S. 520, n.27 (1979), this Court stated that the standards of professional organizations were not determinative to an analysis of the meaning of the Due Process Clause. The Court also found that double bunking two prisoners for short periods of time (generally less than 30 days) in 75 square foot rooms for sleeping purposes only did not cause genuine hardship or privation. The case at bar, however, presents an entirely different situation. First, it involves the Eighth Amendment, which incorporates contemporary standards of decency, and thus is an area in which this Court has properly relied upon the standards of professional organizations. Secondly, the overcrowding found by the district court here did in fact cause extreme hardship and physical mental injury.

at 395; *Ramos* v. *Lamm, supra,* slip op. at 18; *Gates* v. *Collier,* 390 F. Supp. 482, 486 (N.D. Miss. 1975), aff'd 525 F.2d 965 (5th Cir. 1976); *Smith* v. *Sullivan,* 611 F.2d 1039, 1045 (5th Cir. 1979); *Burks* v. *Walsh,* 461 F.Supp. 454, 483, (D.C. Mo. 1978), *aff'd, sub. nom. Burks* v. *Teasdale,* 603 F.2d 59 (8th Cir. 1979); *Palmigiano* v. *Garrahy,* 443 F.Supp. 956, 961 n.2, 979-980 n.30 (D.R.I. 1977).

As we have demonstrated above, the minimum space standards developed by the APHA and other organizations do reflect contemporary minimum standards of civilization and decency, because they are based upon substantial empirical evidence that sustained overcrowding causes unnecessary physical and mental injury.

As the Court's opinions have demonstrated, where a prison condition or practice causes the unnecessary infliction of pain and suffering, that is, pain and suffering which serves no penological purpose, *Estelle,* v. *Gamble,* 429 U.S. at 103, it will not be tolerated. In the case of severe and long term crowding which has been shown to contribute to or cause unnecessary mental and physical suffering or injury, this Court rightfully held such crowding to be violative of the Eighth Amendment. In *Hutto* v. *Finney,* 437 U.S. at 686-688, this Court upheld a lower court ruling that the punitive isolation cells in Arkansas' prisons were unconstitutional relying in part upon the length of confinement and the continued overcrowding among other factors which when taken as a whole, demonstrated that the conditions violated the Eighth Amendment.

Similarly, in *Battle* v. *Anderson,* 564 F.2d 388 (10th Cir. 1977), the Tenth Circuit upheld a lower court finding that the Oklahoma State Penitentiary was unconstitutionally overcrowded where two men were kept for long periods of time in cells of 35-40 square feet. The Court required that each prisoner be provided with at least 60 square feet in a cell and 75 square feet in a dormitory, relying upon the standards of the APHA in formulating a remedy. The Court specifically found that "just as 'water, fire protection, air and food are necessities of life'. . .

the mi' 'mum space to call one's own is a primary psychological necessity. . . ." The Court emphasized that the record in that case demonstrated:

> There is no doubt that the overcrowding increases the inciden[c]e of both infectious communicable diseases (e.g., flu, hepatitis, tuberculosis, etc.), and stress related diseases (e.g., rashes, asthma, hypertension, etc.)
>
> 564 F.2d 388, 398.

Similarly, in *Campbell* v. *McGruder,* 580 F.2d 521, 536 (D.C. Cir. 1978), the court found that based on the facts of that case the overcrowding was likely "to impair the mental and physical health" of the prisoners and therefore was enjoined.

It is clear therefore, that the courts correctly have not hesitated to enjoin long term crowding in prisons where the facts of the particular case, when taken as a whole, demonstrate that it is causing unnecessary and unjustifiable physical or mental suffering or injury to prisoners.

In the case at bar, the district court found that prisoners at the Southern Ohio Correctional Facility generally were confined two men to a 63 square foot cell. Each cell contained basically a double bunk bed, a storage cabinet and a toilet and sink, leaving each man with approximately 24 square feet of floor space. Men were generally confined to those small spaces for at least fourteen (14) hours per day although a substantial percentage were locked in for all but four to six hours per week.

The Court carefully assessed the totality of conditions after viewing the prison and hearing testimony from the prison psychologist, several expert witnesses, prison officials and prisoners.

The Court made findings of fact about the effects of the overcrowding based on the totality of conditions at the prison, findings which are not challenged in this Court.

1. The prolonged overcrowding had caused physical and mental injury to the prisoners. 434 F.Supp. at 1020.

2. The overcrowding caused an increase in tensions and aggressive and antisocial tendencies. 434 F.Supp. at 1017.

3. Although a large percentage of the prisoners had mental disorders the "services rendered [by the single psychologist and social worker]. . . have been substantially denied to a number of inmates due to the double celling." 434 F.Supp. at 1016.

4. The medical staff had not been increased since the days of single celling. . . and there "is evidence. . . of a denial of what inmates consider to be appropriate medical treatment. . ."

5. There were not enough jobs to go around and many inmates who were assigned to jobs worked only an hour or so a day. 434 F.Supp. at 1015.

6. Homosexuality, enforced and consensual, extortion and criminal activity increased with double celling in proportion to the increase in population. 434 F.Supp. at 1020.

The Court held that while double celling was "undoubtedly permissible as a temporary measure", 434 F.Supp. at 1021, under the totality of circumstances at Lucasville, where double celling was a condition of "relative permanance" and prisoners were locked in their cells for most of the day every day for prolonged periods and where the overcrowding had caused physical and mental injury, it was unconstitutional to continue to house two men in a sixty square foot cell.

We believe that the district court's holding – that long term crowding under the totality of the circumstances existing at Lucasville violated the Eighth Amendment – where such crowding was found to have caused physical and mental suffering was correct. Because the Court found that there was no penological justification for the overcrowding, and that it was

causing needless injury, the Court correctly applied this Court's analysis of the Eighth Amendment in *Estelle, Gregg,* and *Hutto, supra* to prohibit the continued overcrowding at the prison.

Of equal importance the district court assessed the adverse effects that the totality of conditions resulting from overcrowding had on the physical and mental health of the prisoners at Lucasville. The court properly recognized that standards of professional organizations were an important source to consider in determining contemporary standards of decency. And the court correctly concluded that minimum space requirements are essential to prevent the unnecessary infliction of physical and mental suffering on prisoners which results from prolonged overcrowding.

CONCLUSION

For the foregoing reasons the *amici* urge the Court to affirm the opinion of the district court.

Respectfully submitted,

JOHN A. KRICHBAUM
(Counsel of record)

WILLIAM P. ISELE
(of Counsel)
AMERICAN MEDICAL
ASSOCIATION
535 N. Dearborn Street
Chicago, Ill. 60610

DAVID A. SOLOMON
AMERICAN PUBLIC HEALTH
ASSOCIATION
1015 15th Street N.W.
Washington, D.C. 20005

Attorneys for Amici Curiae

IN THE

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vs.

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Respondents

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE STATE PUBLIC DEFENDER OF CALIFORNIA IN SUPPORT OF RESPONDENTS

QUIN DENVIR
State Public Defender
of California

Laurance S. Smith
Richard Lennon
Michael Tanaka
Antonia D. Radillo
Deputies State Public Defender

455 Capitol Mall, Suite 360
Sacramento, California 95814
Telephone (916) 322-5298

Attorneys for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The State Public Defender of California hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of Respondents. The consent of the attorney for Respondents has been obtained; a letter reflecting such consent has been forwarded to the Clerk under separate cover, and should be on file in his office. The consent of the attorney for petitioner has also been requested. However, notwithstanding the fact that petitioners' position has been supported by *amici curiae* from 30 states, consent to the filing of this brief was refused.

The State Public Defender of California is an agency of California state government which is charged with the respresentation on appeal of indigent criminal defendants, most of whom are inmates of the state prisons of California. *Amicus* is therefore vitally concerned that conditions in such prisons be consistent with elementary standards of human decency as embodied in the Eighth Amendment. *Amicus* also wishes to inform the Court of the impact a ruling herein will have on the state of California, the nation's largest state and the state having the largest single population of prisoners.

For this reason, we seek the Court's permission to file the attached brief *amicus curiae.*

Respectfully submitted,

QUIN DENVIR
State Public Defender
of California

Laurance S. Smith
Richard Lennon
Michael Tanaka
Antonia D. Radillo
Deputies State Public Defender

By: _____
Laurance S. Smith
Attorneys for Amicus Curiae

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-332

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA IN SUPPORT OF RESPONDENTS

I

"FEDERALISM" IS NOT A CLOAK BEHIND WHICH STATES MAY INDEFINITELY EXPAND PRISON POPULATIONS WHILE REFUSING TO PROVIDE SUFFICIENT FACILITIES TO PERMIT THOSE IMPRISONED TO LIVE CONSISTENT WITH MINIMUM STANDARDS OF HUMAN DECENCY

INTRODUCTION

California, doubtless not unlike many of the other jurisdictions who appear here as *amici curiae* [1] has seen a

recent and dramatic increase in the number of inmates in its state prisons. In California—a state which has been said to already have as many convicts as any other whole nation except the Soviet Union and South Africa—the recent increase in prison population is directly attributable to the passage of an unprecedented series of statutes enacted beginning in 1977.

1977 is the year in which the California Legislature abolished the previous indeterminate sentence system and instituted a new determinate sentencing scheme which expressly disavowed [2] rehabilitation as a goal of imprisonment.[3] The California Legislature has gone on to make it mandatory for an abundance of offenses, including a variety of drug offenses (Cal Pen C. § 1203.07), a variety of sex offenses (Cal Pen C. § 1203.065), a variety of offenses where the victim is age 60 or older or physically handicapped (Cal Pen C. § 1203.09) and a variety of offenses where a firearm is used (Cal Pen C. § 1203.06).

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[1] See Brief of the State of Oregon and 29 others as *amici curiae* in support of Petitioner.

[2] Cal. Pen. C. § 1170; see generally Cal. Stats. 1977 Ch. 1139 as amended by Cal Stats. 1977 Ch. 165, both operative July 1, 1977.

[3] See fn [2], ante; *In re Foss* (1974) 10 Cal 3d 910, 923; 112 Cal Rptr 649: "It is well established that the purpose of the [repealed] indeterminate sentence provisions in California's criminal law is to mitigate the punishment which would otherwise be imposed . . . More importantly, as stated in [*In Re Lee* (1918) 177 Cal 690, 692, 171 P.2d 958] 'These laws place emphasis upon the reformation of the offender. They endeavor to put before the prisoner great incentive to well doing . . . Instead of trying to break the will of the offender . . . the purpose is to strengthen his will to do right . . .' "

On top of this trend to mandatory, non-rehabilitative sentences, other bills have been enacted which dramatically increase the length of those sentences.[4] Terms for sex offenses been extended even further—to the point where rape can be punished more severely than many forms of homicide—and limitations on consecutive sentencing have also been removed.[5]

While the Governor's office has made separate and so far ineffective efforts to build more prisons, it is notable that not one of this plethora of enactments has appropriated a single penny to pay the cost of imprisoning additional persons for longer periods. Moreover, all current indications are that the California Legislature's orgy of increased, mandatory prison terms is not about to abate. As the result of political changes wrought by the 1980 election, key legislative committees have been stacked with legislators who are heavily committed to the passage of more bills of this nature.[6]

Perhaps ironically, one California Legislator, himself the author of the single most sweeping penalty-increase

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[4] Cal Sen. Bill 709 (1978) Cal Stats. 1978 Ch. 579.

[5] Cal. Sen. Bill 13 (1979) Cal Stats. 1979 Ch. 944.

[6] A recent news account describes the situation thusly: "The new Assembly Criminal Justice Committee will be a 12 member panel with a freshman majority and six predictably or avowedly conservative members. . . . Members . . . will be four Republican freshmen (names omitted) all acknowledged conservatives on crime issues. . . . [T]hey will be joined by freshmen Democrat Jim Cramer of Upland, a former District Attorney, and veteran Democrat Alister McAlister of San Jose, author of some of the Legislature's most punitive crime bills. . . ." *Justice Unit Shifts Right*, The Sacramento Bee, Jan 10, 1981 Pg. A-13 col 4.

bill since 1976,[7] has now come to warn publicly that the overcrowding of California prisons has now reached such a dangerous point as to portend another New Mexico or Attica-type holocaust in California.

> "An explosion is building", says Sen. Robert Presley (D-Riverside), frustrated by the Legislature's refusal to build more prisons at a time it is passing more laws requiring judges to put more criminals in prison for longer terms. "We're running the risk of a New Mexico or an Attica (where overcrowding contributed to violent prison riots that killed inmates and destroyed buildings)", adds Presley, Gov. Brown's chief compaigner in the Legislature for more money for prisons.
>
> "We're three or four years behind schedule now, and you're probably going to see even tougher anti-crime legislation passed this year. . . ."[8]

It is against such a real-world background that this Court is asked by Ohio and 30 other jurisdictions who appear as *amici curiae* to erect the banner of "federalism" as a cloak behind which they might conceal failures to act in a manner consistent with human decency toward those they choose to imprison.[9] Their argument borders on the facetious and the grotesque when they urge,

> "A minimum requirement for scrutiny under the eighth amendment is that the pain inflicted be the kind which hurts in a sharp or acute way . . . [The

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[7] Cal. Sen. Bill 709 (1978), fn. *4, ante.*

[8] *Prison Riots: Worsening Cell Shortage Threatens Upheavals,* The Sacramento Bee, Jan. 4, 1981 Pg. A-22, Col 1.

[9] Brief of Oregon and 29 others as *Amici Curiae,* p. 3 and *passim.*

> eighth amendment] does not require that the state house prisoners in the Hay-Adams and enroll them at Georgetown because they would otherwise 'unnecessarily' be discomfitted. . . .
>
> "It has been suggested, but never squarely held, that the eighth amendment prohibits severe mental as well as physical pain . . . If the kind of physical pain proscribed by the eighth amendment is that which hurts . . . the appropriate psychological analogue is mental pain that hurts. The paradigm of such mental anguish is the effect of a Chinese Water Torture." Brief of *Amici Curiae,* pp. 16–18.

But how psychologically "painful" might it be to be locked down for days at a time in a broom-closet size cubicle with someone who is waiting for an opportunity to kill you as soon as you fall asleep? How physically painful is it for a prisoner to have his head sawed off or be burned to death with a blowtorch by other prisoners engaged in a riot induced by the tortuous psychological pressures which result from overcrowding?

Anyone who has taken a course in freshman psychology knows that if too many laboratory hamsters are jammed into a cage, the lack of space breeds a severe degree of tension which, having no other outlet, is turned back upon the other residents of the cage. Often, the results are fatal. Human beings, of course, have the same elemental needs as hamsters, and should be treated by the state with at least the same degre of consideration as would be dictated by standards for the humane care of animals.

"Federalism" certainly prevents this or any federal court from prescribing for the states the exact number

of years which they may impose for a given felony. (Cf. *Rummel* v. *Estelle* (1980) __ U.S. __ 100 S.Ct. 1133.) Federalism likewise does not permit the federal courts to direct the states to operate their prisons so they resemble private universities or luxury hotels—and *amici's* veiled suggestion that any federal judge has ever contemplated such bubblebrained notions is clearly an insult to both the federal judiciary and the Bill of Rights.

Federalism does, however, require that the states act responsibly and within the framework of elemental constitutional standards as they exercise the broad discretion afforded them under the Tenth Amendment. So, if Ohio, California or any other state wishes to send large numbers of persons to prison for long periods of time, with or without rehabilitation being a goal of that imprisonment, then the Legislatures of those states must be prepared to pay the price of such choice by providing living conditions to those imprisoned which are consistent with minmum standards of human decency; conditions wherein prisoners will not be driven crazy or placed in constant jeopardy of assassination by other prisoners, for example. (See *Hutto* v. *Finney* (1978) 437 U.S. 678; *Bell* v. *Wolfish* (1979) __ US. __, 99 S.Ct. 1861.)

Since respondents have never asked for anything more than this, and since the courts below have never granted anything more than such a minimal level inquiry, Respondents are clearly entitled to prevail.

A. The Standard of Review Applicable to Challenges to Conditions of Confinement in a Prison is Whether or not the Totality of Conditions Constitute Cruel and Unusual Punishment

Although the federal judiciary retains its traditional reluctance to interfere with the running of correctional institutions, this "hands off" doctrine has long since ceased to be the cloak behind which prison officials can seek refuge from judicial review of the administration of their facilities. As this court recently noted, "There is no iron curtain drawn between the Constitution and the prisons of this country." (*Wolff v. McDonnel,* 418 U.S. 539, 555–56, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974).) Moreover,

> "... a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison [condition] regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." (*Procunier v. Martinez,* 416 U.S. 396, 405–06.)

Similarly, a state's fiscal limitations or legislative reluctance to undertake the steps necessary to alleviate inadequacies in a prison system have not precluded the federal courts from scrutinizing a facility to determine if it complies with basic constitutional guarantees. As Chief Justice Burger recently acknowledged in his 1980 State of the Judiciary Address, the recent outbreak of violence in New Mexico was not unique. Nearly half of the states currently maintain a prison population that is too large for existing facilities. Prison officials every-

where feel it is only a matter of time before similar outbreaks will occur.

> ". . . specifically, we must focus more attention on the conditions of incarcerated persons . . . When the trial is over we simply cast the guilty into nineteenth century penal institutions". . . .[10]

The 1970's saw some encouraging efforts to redress this imbalance, in large part because of the realization that if those responsible for ensuring decent and responsible correctional administration fail to do so, the courts reach the point where there is no choice but to act.

Especially in these times, it is critical that the federal courts do not shirk their responsibility for protecting the basic constitutional rights of incarcerated persons. The prisons of California, as well as those of many other states, are rapidly reaching and exceeding their capacity. Faced with diminishing resoures, state officials will be sorely tempted to let prison conditions deteriorate until they reach an inhumane level. Prisoners wield no political power; they elect no state legislators. Thus, in all probability it will be left to the federal courts to prevent prisons from further turning into dungeons.[11]

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[10] 1980 State of the Judiciary Address, as reported in the Los Angeles *Daily Journal,* December 21, 1980, p. 13. See Wright v. Enomoto (N.D. Cal. Nov. 3, 1980, Docket No. C-73-1422 S.A.W.) Deposition of George F. Sumner, Warden of San Quentin, p. 5 (hereafter referred to as Deposition of George F. Sumner), in this deposition, Mr. Sumner expresses sentiments similar to those of the Chief of Justice.

[11] It is also worth noting that California prisons were being characterized as "disgraceful dungeons" even before the current overcrowding crisis, and even before the state's formal abandonment of rehabilitation. Murray, *Prison Reform: Backward or Forward* (1975) 50 Cal.St.Bar.J. 357, 361.

Specifically in California, correction administrators have acknowledged that double celling is due to an ever increasing, younger, and more volatile prison population.[12]

Over a 24 year period California has seen a constant shift in the inmate profile. The shift has changed from a population comprised of mostly non-violent property offenders to those incarcerated for crimes against persons. Currently, 11,063 inmates are incarcerated for homicide, robbery, rape or assault as compared to a counterpart of 3,652 in 1951. This represents more than a threefold increase of violent inmates within the California institutions.[13] Additionally, California accepts the more violent offenders from the federal system and other states.[14] One must also add to this California's gang problem which breeds additional violence and tension.[15]

California correctional officials also acknowledge that many of their physical facilities are inadequate to today's needs. The San Quentin and Folsom facilities which house the most serious offenders, were built in 1852 and 1880 respectively, and are indeed the 19th century dungeons the Chief Justice spoke of.[16] It is within these institutions that the various administrative segregation units are placed, housing the most serious management

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[12] Facilities Requirements Plan, California Department of Corrections, April 17, 1980 pp. 2–8, herein referred to as Facilities Plan.
[13] Facilities Plan, p. 2–13 and 2–14.
[14] Deposition of George F. Sumner, p. 21, 22, 26 & 27.
[15] Deposition of George F. Sumner, p. 21 & 26.
[16] California Department of Corrections Program and Planning Report, April, 1978, Volume 1, p. 7.

problems of the system.[17] It is also within these institutions (as well as the general population and other institutions) where double celling has occurred. In San Quentin, the average cell space is *43 square feet,* far below the American Correctional Association (ACA) standards of 60 square feet for *one* person.[18] An inmate in administrative segregation spends the vast majority of his time within his cell, only two hours of exercise a day are allowed.[19] Placing another man in these cramped quarters further sows the seeds for violence.

As we have pointed out above, the population influx is not about to lessen. July of 1977 saw the advent of Determinate Sentencing in California. The legislation whittled away much of the power of the parole board to release inmates except as it pertained to the remaining indeterminately sentenced offenders. The Uniform Determinate Sentence Act of 1976[20] and subsequent legislation has eroded much of a trial judge's sentencing prerogatives. Mandatory prison sentences represent the current legislative vogue. As Howard Way, the California Secretary of the Youth and Adult Corrections

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[17] California Department of Corrections Manual ch. 3600. Section 3601 describes the type of offender who is housed in the administrative segregation units:

"*General Policy.* It is the policy of the department to provide housing separate and apart from the general inmate population for the close supervision and control of inmates who cannot be housed in a general population without unduly endangering institution security or the safety of self or others. Collectively, such housing is defined as administrative segregation. . . ."

[18] See Facilities Plan, p. 4–1 & 5–71 and Deposition of George F. Sumner, p. 4.

[19] Deposition of George F. Sumner, p. 7.

[20] Cal.Stats. 1977, Ch. 1139.

Agency, has stated:

> "In California, we incarcerate more people on earth, except Russia and a few countries in Africa."

Way also pointed out that cells at Folsom and San Quentin are more than 100 years old and do not meet contemporary fire and safety standards.[21]

The California Department of Corrections recognizes the ACA standards as the legitimate reasonable representation of contempory penal philosophy in the United States. They are considered pragmatic rather than "utopian" as petitioner has described them.[22]

Even if one were to assume that the California Legislature will appropriate the funds to build new prisons or remedy the existing ones' problems, enough prison space will not be ready to house the anticipated number of inmates until at least 1986.[23] If the Legislature continues its past course of enacting ever-longer sentences without appropriations to cover their cost, the result will be double celling on a permanent basis. Given the reality of the situation, neither California nor Ohio can rely exclusively on the responsiblity and good will of their

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[21] *Sacramento Bee,* Sunday, January 4, 1981, p. A-22.
[22] Compare Facilities Plan, p. 4–1, *with* Pet'r's Brief. Pg. 26.
[23] INSTITUTION POPULATION PROJECTED (Facilities Plan, pg. 3–18):

Projected as of June 30	Total Population	Male Total	Female Total
1980	23,427	22,125	1,302
1981	24,512	23,170	1,342
1982	25,195	23,835	1,360
1983	25,835	24,445	1,390
1984	26,465	25,035	1,430
1985	26,980	25,520	1,460

respective legislatures.

As it was put by one federal court dealing with the especially sordid situation in Arkansas:

> . . . The obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, upon what Respondents themselves may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States. (*Holt* v. *Sarver* 309 F.Supp. 385 (D. Ark. 1979).)

Double celling of the most violent offenders in the most decrepit of California prisons is all but certain to increase, given the conditions outlined above. This is so even though the cells in San Quentin and Folsom were designed to house one inmate, not two, and despite ACA standards which provide that an inmate who spends no more than 10 hours per day locked up be housed in cell space of 60 square feet. If locked up in detention for more than 10 hours a day, the area requirement is 80 square feet.[24] Inadequate cell space plus a violent prone population with its attendant problems is precisely what is threatening to spark an Attica or New Mexico-type riot in California.

Clear standards are indispensible for ensuring that conditions in any given institution meet constitutional requirements. In recent years the "totality of conditions" doctrine has emerged as the cornerstone of con-

[24] Facilities Plan, p. 4–11.

stitutional scrutiny of prison conditions because the older and more historical approaches to the adjudication of these claims have proved irrelevant and inadequate.[25] Thus the relevant issue is not whether a given condition or practice "shocks the conscience," or whether disproportionate or excessive punishment is imposed, or whether the challenged practice goes beyond what is reasonably necessary. Rather the primary issue is whether the totality of prison conditions and practices constitute cruel and unusual punishment. (*Id.*, at 902–906, 915.) [26]

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[25] (See, Robbins and Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervisions of State Penal Administration Under the Eighth Amendment* (1977) 29 Stan.L.R. 893, 901–902; See also *Jackson* v. *Bishop* 404 F.2d 571, 576–579 (8th Cir. 1968).)

[26] See e.g., *Holt* v. *Sarver* 309 F.Supp. 362 (E.D. Ark. 1970) aff'd 442 F.2d 304 (8th Cir. 1971); *Rhem* v. *Malcolm,* 507 F.2d 333 (2d Cir. 1974); *Aikens* v. *Lash,* 371 F.Supp. 482 (N.D. Ind. 1974) aff'd 514 F.2d 55, 534 F.2d 751, 547 F.2d 372; *Barnes* v. *The Virgin Islands,* 415 F.Supp. 1218 (D. V.I. 1976); *Ahrens* v. *Thomas* 434 F.Supp. 873 (WD. Mo. 1977) aff'd and mod. 570 F.2d 286 (8th 1978); *Laaman* v. *Helgemoe,* 437 F.Supp. 269 (D. N.H. 1977); *Miller* v. *Carson* 563 F.2d 741 (5th Cir. 1977); *Williams* v. *Edwards,* 547 F.2d 1206 (5th Cir. 1977); *Campbell* v. *McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Hardwick* v. *Ault,* 447 F.Sup. 116 (M.D. Ga. 1978); *Jefferson* v. *Southworth,* 447 F.Supp. 179 (D. RI. 1978); *Jordan* v. *Wolke,* 460 S.Supp. 1080 (E.D. Wisc. 1978) Rev'd 615 F.2d 749 (7th Cir. 1980); *Johnson* v. *Levine,* 450 F.Supp. 648 (D. Md. 1978) aff'd 588 F.2d 1378 (4th Cir. 1978); *M.C.I. Concord Advisory Board* v. *Hall,* 447 F.Supp. 398 (D. Mass. 1978); *Nelson* v. *Collins,* 455 F.Supp. 727 (D. Md. 1978) aff'd in part sub nom *Johnson* v. *Levine,* 588 F.2d 1378 (4th Cir. 1978); *Wolfish* v. *Levi,* 573 F.2d 118 (2d Cir. 1978) rev'd in part sub nom *Bell* v. *Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Burks* v. *Teasdale,* 603 F.2d 59 (8th Cir. 1979); *Palmigiano* v. *Garrahy,* 599 F.2d 17 (1st Cir. 1979); *Ramos* v. *Lamm,* 485 F.Supp. 122 (D. Colo. 1979); *Capps* v. *Atiyeh,* 495 F.Supp. 802 (D. Ore. 1980); *Smith* v. *Sullivan,* 611 F.2d 1039 (5th Cir. 1980).)

Examining conditions at the Mississippi State Prison, the Fifth Circuit Court of Appeal noted: "Each factor separately . . . may not rise to constitutional dimensions; however the effect of the totality of these circumstances is the infliction of punishment on inmates violative of the Eighth Amendment . . ." (*Gates* v. *Collin,* 501 F.2d 1291, 1294 (5th Cir. 1979).) Similarly, the totality of condition in an Arkansas prison was found to raise the relevant facts to levels where, together, they achieve a constitutional underpinning: "All of these things exist in combination; each affects the other; and taken together they have a cumulative impact [which constituties] . . . cruel and unusual punishment." (*Holt* v. *Sarver,* 309 F.Supp. 362, 372 (E.D. Ark. 1970) aff'd 442 F.2d 304 (8th Cir. 1971).) And as the Fourth Circuit Court of Appeal noted recently, institutional factors "can reach such proportions that the impact of the aggregate effect amounts to cruel and unusual punishment." (*Johnson* v. *Levine,* 588 F.2d 1378, 1380–81 (4th Cir. 1978).)

The complex nature of prisons gives rise to a myriad of conditions within each prison; these conditions necessarily differ from prison to prison. Only, the totality test allows the courts to account for differences among prisons while still using an objective standard.

B. The Number of Prisoners Housed in a Cell, Its Size, the Amount of Time Spent Confined in it, and the Diversions Offered Are Key Factors Which Must Be Considered in Determining Whether the Totality of Conditions Violates the Eighth Amendment

The size of a prisoner's living space, the time he is confined there, the availability of outside cell activities, and any overcrowding in his cell are all factors to be weighed in determining whether there has been an Eighth Amendment violation.[27] No one factor has been

[27] See *Capps* v. *Atiyeh*, 495 F.Supp. 802, 814 (D. Ore. 1980). A similar analysis was undertaken by this court in affirming the lower court's order in the Arkansas cases. (*Hutto* v. *Finney*, 437 U.S. 678, 686–87, (1978).) It has also formed the basis for rulings in dozens of prison/jail cases in the lower courts. (See e.g., *Campbell* v. *McGruder*, 580 F2d 571 (D.C. Cir. 1978); *Battle* v. *Anderson*, 564 F.2d 388 (10th Cir. 1977); *Williams* v. *Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Detainees of the Brooklyn House of Detention for Men*, 520 F.2d 392 (2d Cir. 1974); *Rutherford* v. *Pitchess*, 457 F.Supp. 104 (C.D. Calif. 1978); *Gates* v. *Collier*, 454 F.Supp. 567 (N.D. Miss. 1978); *Nelson* v. *Collins*, 455 F.Supp. 727 (D. Md. 1978) aff'd in part, sub nom *Johnson* v. *Levine*, 588 F.2d 1378 (4th Cir. 1978); *Stewart* v. *Gates*, 450 F.Supp. 583 (C.D. Calif. 1978) rev'd 618 F.2d 117 (9th Cir. 1980); *MCI Concord Advisory Board* v. *Hall*, 447 F.Supp. 398 (D. Mass. 1978); *Bono* v. *Sabe*, 450 F.Supp. 934 (E.D. Ill. 1978) aff'd in part 620 F.2d 609 (7th Cir. 1980); *Palmigiano* v. *Garrahy*, 443 F.Supp. 956 (D. R.I. 1977) rev'd *Palmigiano* v. *Garrahy*, 599 F.2d 17 (1st cir. 1979); *Pugh* v. *Locke* 406 F.Supp. 318 (MD Ala. 1976) aff'd sub nom *Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977) rev'd sub nom *Alabama* v. *Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *West* v. *Lubbock County Comrs. Court*, 444 F.Supp. 824 (N.D. Tex. 1977); *Ahrens* v. *Thomas*, 434 F.Supp. 873 (W.D. Mo. 1977) aff'd in part, mod. in part 570 F.2d 286 (8th Cir. 1978); *Morgan* v. *Sproat*, 432 F.Supp. 1130 (S.D. Miss. 1977); *Anderson* v. *Redman*, 429 F.Supp. 1105 (D. Del. 1977); *U.S. ex rel. Wolfish* v. *United States*, 428 F.Supp. 333 (SD NY 1977) aff'd sub nom *Wolfish* v. *Levi* 573 F.2d 118 (2d Cir. 1978) rev'd sub nom *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Moore* v. *Janing*, 427 F. Supp. 567 (D. Neb. 1976); *Ambrose* v. *Malcolm*, 414 F. Supp. 485 (SD NY 1976); *Martinez Rodriguez* v. *Jimenez*, 409 F.Supp. 582 (D.P.R. 1976) aff'd 551 F.2d 877 (1st Cir. 1977); *Alberti* v. *Sheriff of Harris County*, 406 F.Supp. 649 (SD Tex. 1975); *Miller* v. *Carson*, 401 F.Supp. 835 (MD Fla. 1975) aff'd in part, mod. in part, 563 F2d 741 (5th Cir. 1977).

found which can sustain a finding of unconstitutionality. Cell size, idle hours, etc. do not individually mandate findings of non-compliance with constitutional requirements. But the courts have unhesitatingly declared that confining two prisoners in a small cell for most of their waking hours, without activity to occupy their time, constitutes cruel and unusual punishment.[28]

It is important for the court to examine the multiplicity of problems which accompany the practice of doubling celling. The deleterious effects of double celling upon an inmate's existence manifest themselves in other areas besides the constant threat of violence. The continuing population increase cuts down on the number and the quality of visiting which is universally acknowledged to provide a basic rehabilitating effect on a prisoner. The reduction and/or elimination of vocational services especially effects the indeterminately sentenced inmate who must demonstrate rehabilitation to

[28] See, e.g., *Burks* v. *Teasdale,* 603 F.2d 59, 63 (8th Cir. 1979); *Johnson* v. *Levine,* 588 F.2d 1378, 1380–1381 (4th Cir. 1978); *Campbell* v. *McGruder,* 580 F.2d 521 (D.C. Cir. 1978); *Duran* v. *Elrod,* 542 F2d 998, 1001 (7th Cir. 1976); *Detainees of the Brooklyn House of Detention for Men* v. *Malcolm,* 520 F.2d 392, 398–99 (2d Cir. 1974); *Ramos* v. *Lamm,* 485 F.Supp. 122, 154–55 (D. Colo. 1979); *Washington* v. *Kelly,* 479 F.Supp 569 (D. Md. 1979); *Burks* v. *Walsh,* 461 F.Supp. 454, 476–77 (WD Mo 1978); *Jordan* v. *Wolke,* 460 F.Supp. 1080, 1086–87 (ED Wisc. 1978) rev'd 615 F.2d 749 (7th Cir. 1980); *Nelson* v. *Collins,* 455 F.Supp. 727, 734 (D. Md. 1978) aff'd sub nom *Johnson* v. *Levine* 588 F.2d 1378 (4th Cir. 1978); *Johnson* v. *Levine,* 450 F.Supp. 648, 656–57 (D. Md. 1978) aff'd 588 F.2d 1378 (4th Cir. 1978); *M.C.I. Concord Advisory Board* v. *Hall,* 447 F.Supp. 398, 404 (D. Mass. 1978); *Jones* v. *Wittenburg,* 440 F.Supp. 60 (N.D. Ohio 1977); *Anderson* v. *Redman,* 429 F.Supp. 1105, 1120 (D. Del. 1977); *Ambrose* v. *Malcolm,* 414 F.supp. 485 (SD NY 1976).

the parole board before it deems one eligible for release. Also, forced idleness contributes to tension within the prison system.[29]

> The lack of rehabilitative programs would, in the face of 'other conditions' be violation of the Eighth Amendment. *Finne* v. *Arkansas Board of Corrections,* 505 F.2d 194 (8th Cir. 1974) commenting on *Holt* v. *Sarver* 309 F.Supp. 363 (E.D. Ark 1970).

One characteristic which specifically holds true for all prisons is the psychological impact of double celling. In 1979, at San Quentin, 26 inmates were admitted to the prison psychiatric ward as a direct result of the mental trauma of double celling.[30] Double celling, whether in lock up or the mainline population presents the risk of increased sexual assaults, bodily injury and possible death.[31] In the lock-up units, the Warden of San Quentin

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[29] Facilitites Plan, p. 4–28

[30] Deposition of George F. Sumner, p. 23.

[31] At p. 3–4 of his declaration in *Wright* v. *Enomoto, supra,* Terry A. Kupers, M.D., describes a prisoner's greatest fears as those of violence and homosexual rape. See also California Department of Corrections Classification Manual ch. 7000 section 7001 (b) & (c) which describes the type of inmate housed at San Quentin:

"(b) This institution provides for department population adjustment. Inmates who cannot be accommodated at other institutions for various reasons are placed at San Quentin. It has therefore been necessary to provide for departmental management cases as well as routine transfers.

(c) There are three security housing units providing a closely supervised program for inmates unable to adjust to the general population. In general, these security housing units will handle a younger, less recidivistic group than the unit at Folsom."

Ch. 6900, section 6903 (A) (4) describes the housing of aggressive masculine-role homosexuals at Folsom:

"(4) Homosexuals. The transfer of aggressive masculine role homosexuals to Folsom is established department policy. Because of this situation, special care must be taken to avoid placement of feminine-role homosexuals in the general population of

has described many inmates as potential killers.[32] In 1979, no murders occurred in the general population, as the violence is "more or less confined to the management control units and security housing units."[33]

Studies show that space and crowding have a definite effect on the mental health of those incarcerated. An increase in social density, a decrease in cell space and/or increase in total institutional population results in a marked rate of mental breakdown, suicide, hypertension and other psychosomatic ailments.[34] Orientation to natural lighting is vital to maintain a diurnal rhythm. Artificial lighting does not provide an adequate substitute but rather, results in disorientation, confusion or psychosis. Many prison cells do not have windows. Also windows across a hallway will not remedy the problem. Lack of proper lighting or inadequate light increase the chances for mental disorder.[35] Add these factors to

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this institution. The exception is in the case of such homosexuals as may be confined in the security housing unit after placements in other segregated units.

Additionally, section 6901 (a) & (b) of the same chapter describe the other type of inmate housed at Folsom prison.

"Section 6901. General Information. (a) Folsom Prison is the only maximum security institution and is designed for the confinement of recidivists in need of intensive custodial supervision. Because of the nature of its facilities, some use is made of the institution for the confinement of severe behavior problem cases who are not responsive to psychiatric treatment.

"(b) A security housing unit is located at this institution for the control and treatment of especially serious behavior problems. While a psychiatrist is assigned to the institution staff, his administrative requirements are such that *a program of intensive treatment cannot be offered.* . . ."

[32] Deposition of George F. Sumner, p. 37.

[33] Deposition of George F. Sumner, p. 36.

[34] Declaration of Terry A. Kupers, p. 5 & 6.

[35] Declaration of Terry A. Kupers, p. 8.

inadequate cell size, fear of physical violence, inadequate cell temperature, intolerable noise levels and the result is ever-increasing potential for an explosion of violence. Men confined in maximum security units have few if any outlets (industry and educational opportunities) to serve as a safety valve to release tension the alternatives are mental breakdown, violence and/or recidivism.

In the case at hand, the district court, after analyzing voluminous evidence, found that the totality of the prisoner's conditions at the Southern Ohio Correctional Facility (SOCF) constituted cruel and unusual punishment. (434 F. Supp. at 1016–17, 1020–21.) While the court found that isolated conditions did not rise to the level of constitutional violations, it nevertheless found the totality of the living situation unconstitutional. (*Ibid.*)

The court specifically found that *within the context* of the "totality of circumstances" present at SOCF, double celling was unconstitutional. Although the court did not detail the exact effect double celling had on SOCF prisoners, it did note that it increased frustration, tension, and acting out behavior and exacerbated problem of idleness and decreased the availability of services. These and other effects of double celling have been recognized by many courts.

As the Eighth Circuit Court of appeal has stated, "it must be recognized that putting two men in such a small cell and keeping them there for long periods of time can produce intolerable tensions and will *almost inevitably*

cause trouble not only to inmates but also to prison personnel." (*Burks* v. *Teasdale, supra,* 603 F.2d at 63; emphasis added.) The district court in *Johnson* v. *Levine* similarly found, on the basis of expert testimony, that "double-celling increases the risk of sexual attacks by one prisoner on another and decreases the ability of prison guards to protect younger and weaker inmates from such homosexual assaults . . . [and leads to a] "constant fear of such assault which amounts to an undue burden placed upon prisoners. . . ." (450 F.Supp. at 656.)

After considering much evidence, including the opinions of several experts, the district court in *Burks* v. *Walsh* found that effects of double celling deprives prisoners of much needed privacy, fosters friction, hostility, and forcible homosexuality. It creates management and security problems. It causes "debilitation" and adversely affects individual efforts at rehabilitation. (*Id.* 461 F.Supp. at 476–77.) Other courts have found a deleterious effect of double celling on the provision of minimally adequate medical care. (See *Campbell* v. *McGruder, supra; Capps* v. *Atiyeh,* 495 F.Supp. 802 (D. Ore. 1980); *Lightfoot* v. *Walker,* 486 F.Supp. 504, 523–24 (S.D. Ill. 1980).) Several have found it causes security problems. (See, e.g., *Nelson* v. *Collins, supra,* 455 F.Supp. at 734.)

In California, the district court recently banned double celling in long term segregation units. (*Wright* v. *Enomoto, supra,* __ F.Supp. __ (N.D. Cal. Nov. 3, 1980, Docket No. C-73-1422 S.A.W.).) The court's decision was based in large part on the testimony of George Sumner, the warden of San Quentin State Prison. Sumner called

double celling "inhuman" because it leads to increased tension and violence, as well as psychological breakdowns. He made reference to the previously-mentioned 26 inmates who had been admitted to the prison psychiatric ward as a direct result of the mental trauma of double celling. Ruth Rushen, Director of the California Department of Corrections, also labelled double-celling an "unhumane" practice. The district court specifically found that double-celling "engenders violence, tension, and psychiatric problems." (*Wright* v. *Enomoto, supra,* at p. 5.)

Thus although confinement of two prisoners in a single cell is not per se unconstitutional, double celling clearly is a key factor entitled to great weight in determining whether an Eighth Amendment violation is proven. The deleterious impact of double celling on the "totality of circumstances" can be pivotal, changing a constitutionally tolerable prison into an intolerable one.

CONCLUSION

The lower court's decision in the instant case represents a detailed constitutionally-supported examination of prison conditions at SOCF. While the court did not find any one specific constitutional infirmity, it did find, after well-reasoned analysis, that the totality of the living situation at SOCF constituted an Eighth Amendment violation. In making its finding, the court was well within the mainstream of the modern judicial approach to resolving Eighth Amendment claims. As the court remarked in *Weems* v. *United States* 217 U.S. 349 " 'the

cruel and unusual punishment' clause of the Eighth Amendment is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice'." Prisoners are entitled to be physically and mentally secure. The practice of doubling celling with all its attendant problems does not provide this guarantee. Unless its concluson was totally without foundation, it should not be overturned.

Therefore, for the simple and compelling reason that *amicus* does not wish to see official inertia and expediency, left entirely unchecked by federal scrutiny, put where it may cause serious psychological or physical injury to *amicus'* many clients, we respectfully urge that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

QUIN DENVIR
State Public Defender
of California

Laurance S. Smith
Richard Lennon
Michael Tanaka
Antonia D. Radillo
Deputies State Public Defender

By: _____
Laurance S. Smith
Attorneys for Amicus Curiae

NO. 80-332

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES A. RHODES, ET AL.,
Petitioners,

V.

KELLY CHAPMAN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF TEXAS IN SUPPORT OF THE PETITIONERS

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

ED IDAR, JR.
Chief, Civil Rights Section
Enforcement Division
Assistant Attorney General

KENNETH L. PETERSEN, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Amicus Curiae
State of Texas

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BRIEF OF AMICUS CURIAE STATE OF TEXAS IN SUPPORT OF THE PETITIONERS

The State of Texas, by and through the Attorney General of Texas, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The State of Texas maintains, through the Texas Department of Corrections (TDC), the largest penal system in this country. On April 12, 1974, the Hon. William Wayne Justice, District Judge, United States District Court for the Eastern District of Texas, sua sponte consolidated several individual claims filed by

TDC inmates pro se and ordered the appearance of the United States as amicus curiae in what later became the class action lawsuit of *Ruiz, et al. v. Estelle, et al.*, Civil Action No. H-78-987 (Southern District of Texas, Houston Division, pending).[1] Shortly thereafter, the United States successfully petitioned to intervene as a plaintiff-intervenor in the action, seeking broad relief from conditions of confinement at the TDC which were, allegedly, violative of the Eighth Amendment. *See Estelle v. Justice*, 426 U.S. 925 (1976) (Rehnquist, J., dissenting). Both the United States and the plaintiff class of TDC inmates contended, throughout the trial of this cause, that, *inter alia*, the TDC is unconstitutionally overcrowded.[2] Thus, the State of Texas and its prison system have a direct and substantial interest in the question of the Eighth Amendment standards by which overcrowded prison systems are determined to be in violation of the Constitution.

SUMMARY OF THE ARGUMENT

Notwithstanding the District Court's disavowal, in *Chapman v. Rhodes*, 434 F.Supp. 1007 (S.D.Ohio 1977), of holding double celling unconstitutional per se, and the Sixth Circuit's apparent conclusion that no per se rule has been applied in its summary affirmance of this case, the net result of the District Court and Sixth Circuit decisions is to create a rule of law that double

[1]This case was originally docketed as Civil Action No. 5523 in the Tyler Division of the Eastern District of Texas. Subsequently, it was certified as a class action and transferred to the Houston Division of the Southern District of Texas for trial and re-docketed as Civil Action No. H-78-987.

[2]After several years of discovery, trial commenced on October 2, 1978, and concluded on September 20, 1979, after one hundred and fifty-nine days of presenting testimony, exhibits, expert reports, and other evidence. A total of 349 witnesses testified. While no ruling had been made at the time of preparing this brief, one is expected by the time this brief is filed.

celling is per se violative of the Eighth Amendment. Such a holding is contrary to the reasoning of this Court's prior decisions and a proper reading of the Eighth Amendment.

The Eighth Amendment requires that conditions of confinement not result in the wanton infliction of serious injury. Application of the Eighth Amendment to claims of unconstitutional double celling involves an assessment whether, under the totality of the circumstances, the confinement of two prisoners to a cell of a given amount of space over a given length of time inflicts genuine punishment. The Eighth Amendment is not a vehicle by which the federal courts may legislate the "ideal" or the "preferable" in prison management and conditions. Yet the District Court and the Sixth Circuit have employed a reading of the Eighth Amendment that accomplishes just such a result in this case. Viewing the totality of the circumstances of confinement at the Southern Ohio Correctional Facility (SOCF), there is no wanton infliction of genuine privations and hardships evidenced by the record in this case. Those minor diminishments in services identified by the District Court in its reported decision are not such as to be cognizable under the Eighth Amendment, nor are they the result of double celling.

ARGUMENT

THE COURT BELOW ERRED IN DETERMINING THAT DOUBLE CELLING OF INMATES AT THE SOUTHERN OHIO CORRECTIONAL FACILITY AT LUCASVILLE, OHIO, IS UNCONSTITUTIONAL.

1. The Court Must First Determine That Double-Celled Confinement In A State Prison System Directly Causes Serious Injury To Prisoners Before An Eighth Amendment Violation Can Be Found.

This Court previously has detailed the evolution of the Eighth Amendment's prohibition of cruel and unusual punishment and its application to the States, noting that more recent decisions "have held that the Amendment proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Thus, this Court has "held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,'. . .or which 'involve the unnecessary and wanton infliction of pain'. . ." *Id.*, 429 U.S. at 102-103 (citations omitted). *See also Hutto v. Finney*, 437 U.S. 678, 685 (1978).

Nevertheless, this Court has also recognized that the evolving standards of decency encompass only those "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Estelle v. Gamble, supra*, 429 U.S. at 106.[3] No claim is stated under the Eighth Amendment where the allegation of, for example, medical mistreatment does no more than invite the federal courts to substitute their own medical judgment for that of prison medical officials. *Id.*, 429 U.S. at 106, 107.

As *Gamble* teaches, there must be some serious injury attributable to the condition of confinement made the subject of review under the Eighth Amendment before any constitutional injury can be established. A question of prison design and management philosophy is not, in and of itself, a question for federal court review. As one circuit court has held,

[3]*See Dickson v. Colman*, 569 F.2d 1310, 1311 (5th Cir. 1978); *Twyman v. Crisp*, 584 F.2d 352, 355 (10th Cir. 1978), in which the lower courts have underscored the importance of a serious medical consequence resulting from deliberate indifference in establishing an Eighth Amendment injury under this Court's holding in *Gamble*.

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.

Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

In the absence of evidence to indicate that serious harm cognizable under the Eighth Amendment is caused directly and unavoidably by the confinement of a prison population of a given size, there is no basis for federal court implementation of recommended goals and idealistic standards which "do not establish the constitutional minima." *Bell v. Wolfish*, 441 U.S. 520, 543 n. 27 (1979). *See also Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119, 137-138 (Burger, C.J., concurring) (1977). Thus, the Fifth Circuit Court of Appeals recently has rejected the use of such "standards" and recommended population limits, holding that "[a] limitation on the inmate population . . . may be necessary, but the district court should impose such limitation only if the court finds on remand, after a hearing and evaluation of evidence relating to *the totality of conditions* at the jail as they now exist, that the jail is overcrowded and that, considered with all of the other existing conditions, incarceration therein is violative of the prisoners' constitutional rights." *Smith v. Sullivan*, 611 F.2d 1039, 1045-1046 (5th Cir. 1980) (emphasis in original).[4] *See also Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979).

[4]The Fifth Circuit also cautioned that "the court should take care to establish a sufficient evidentiary basis for any inmate population limit that it decides to order as a result" of its hearing and reevaluation on remand. *Id.*, 611 F.2d at 1046 n. 12.

The State of Texas submits that the proper determination is one where some specific, concrete injury violative of the Eighth Amendment's prohibition of cruel and unusual punishment is found to exist as a direct consequence of overcrowded conditions. On the facts of this case, as in *Bell v. Wolfish, supra*, "[w]hile the practice of double-bunking may have taxed some of the equipment or particular facilities in certain of the common areas, . . . this does not mean that the conditions at the [detention center] failed to meet the standards required by the Constitution." *Id.*, 441 U.S. at 543 (citation omitted).

Certainly, this Court did not review the conditions of confinement at the pretrial detention facility at issue in *Wolfish* under the Eighth Amendment in deciding that, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.*, 441 U.S. at 535. In reserving the Eighth Amendment question "concerning minimum space requirements" for institutions confining convicted felons, this Court did not "decide whether we agree with the reasoning and conclusions" of the District Court in the case sub judice. *Id.*, 441 U.S. at 543 n. 27. However, this Court did decide that, "[w]hile confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record." *Id.*, 441 U.S. at 542. There is no question in this case that punishment is proper for those inmates confined at the SOCF, and the standard for constitutional review is to be found under the Eighth Amendment. *Id.*, 441 U.S. at 535 n. 16. The State of Texas submits that, under the Eighth Amendment, the proper determination is whether a given number of people have been confined in a given amount of space in such a manner as to cause

them to endure genuine privations and hardships constituting cruel and unusual punishment.

2. No Injuries Violative Of The Eighth Amendment Are Present In This Case.

In the case sub judice, the District Court found no injuries cognizable under the Eighth Amendment that directly and unavoidably resulted from the double-celled conditions of confinement at the Lucasville facility. The District Court found "no indication whatsoever that prisoners have been underfed or that food facilities have been taxed by the prison population." *Chapman v. Rhodes*, 434 F.Supp. 1007, 1014 (S.D. Ohio, 1977). Nor was it established "that violent incidents have increased out of proportion to the increase in inmate population." *Id.* "[N]o evidence was produced to substantiate" any substantial infringement of the use of visitation facilities. *Id.* Security staffing at the prison was "well within the acceptable ratio." *Id.* 434 F.Supp. at 1015. "No evidence was presented which would demonstrate that the plumbing, lighting, or law library facilities are inadequate to meet the needs of the increased population." *Id.* There was "no increase in violence or criminal activity increase due to double celling." *Id.*, 434 F.Supp. at 1018. The institution itself was "not unusually stuffy or humid," had adequate ventilation, and was not appreciably characterized by "[o]ffensive odors." *Id.*, 434 F.Supp. at 1014. And while the medical staff had not been increased commensurate with the increase in prison population, the District Court found that the situation affecting the provision of medical services "cannot be described as out of hand or the result of indifference." *Id.*, 434 F.Supp. at 1016. The only putatively deleterious effects which the District Court found worthy of mention were a delay in receiving educational opportunities and interference with study habits by inmates attending classes, id., 434 F.Supp. at 1015; the curtailment of psychologist and social worker

services, *id.*, 434 F.Supp. at 1016; and a curtailment of job opportunities for prisoners. *Id.*, 434 F.Supp. at 1015.

The District Court failed to identify any constitutional right to job and educational opportunities -- immediate or otherwise. Nor did the District Court identify any harm to inmates resulting from the curtailment of social worker and psychologist services or the constitutional source for such services. Yet, despite its failure to make such findings and despite findings that show the totality of conditions at the SOCF to be well beyond the reach of the Eighth Amendment's proscription of cruel and unusual punishment, the District Court nevertheless ordered that "the State must proceed with reasonable dispatch to formulate, propose and carry out some plan which will terminate double celling at SOCF." *Id.*, 434 F.Supp. at 1022. The District Court held "overly and on balance that the double celling at Lucasville is unconstitutional" for several reasons. *Id.*, 434 F.Supp. at 1020. The State of Texas submits that these reasons for holding double celling unconstitutional as practiced at the SOCF are insufficient jurisdictionally under a proper reading and application of the Eighth Amendment.

The first reason identified by the District Court is that "[t]he inmates are 'long term,' " and that this "can only accent the problems of close confinement and overcrowding." *Id.* While this Court has expressed its sentiment "that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards," this Court also has recognized that "[t]he length of time each inmate spent in [confinement is] simply one consideration among many." *Hutto v. Finney, supra*, 437 U.S. at 686, 687. In the case sub judice the District Court has found, in a conclusory fashion, that whatever problems are attendant to "close confinement and overcrowding," those problems assume a weightier dimension by the fact of double celling. There is no analysis of the record

in this case to support this conclusory finding. Even assuming, arguendo, that the increased population has occasioned a curtailment of counseling services, inmate jobs, and educational opportunities, and that these problems assume a constitutional dimension, these problems are attributable to the change in inmate-staff ratio, and *not* to the fact of double celling. By definition, increases in any population almost invariably create short term reductions in the provision of public services. There is no suggestion on the facts of this case, however, that any such short term reductions have occasioned constitutional injuries.

The District Court also cites among its reasons the fact that SOCF is thirty-eight percent over its design capacity, and that various organizations have recommended a certain minimum of space per inmate which SOCF does not provide. *Chapman v. Rhodes, supra*, 434 F.Supp. at 1020, 1021. The District Court apparently found that confinement in excess of design capacity and in contravention of recommended standards violates "contemporary" standards of decency. *Id.*, 434 F.Supp. at 1021. As this Court has held previously, such standards do not define the minimum standards of the Constitution and, therefore, are not the proof of constitutional injury which is a jurisdictional prerequisite for federal court relief. *Bell v. Wolfish, supra*, 441 U.S. at 543 n. 27. The same reasoning applies to design capacity standards, which are nothing more than *recommendations* as to the ideal size of an inmate population that can be confined in an institution.

The District Court further cites among its reasons the fact that "a prisoner who is double celled will spend most of his time in the cell with his cellmate." *Chapman v. Rhodes, supra*, 434 F.Supp. at 1021. Analyzed against the relief ordered by the District Court that all inmates will be single-celled, this apparently means that a prisoner who spends most of his time in a cell should not, constitutionally, be forced to spend that time with a

cellmate. The District Court has failed to establish any injury resulting, ipso facto, from the confinement of two prisoners to a cell. Indeed, while noting that "the plaintiffs come close to . . . claim[ing] that double celling is per se unconstitutional," *id.*, 434 F.Supp. at 1009, and disavowing any attempt to so find, id., 434 F.Supp. at 1021, the District Court does exactly that by ordering the elimination of double celling in the absence of any injury attributable to the confinement of two prisoners to a single cell.

Finally, the District Court cites among its reasons the fact that, as the prison population in Ohio has continued to increase, "the double celling at Lucasville has done nothing but increase." *Id.*, 434 F.Supp. at 1021. Again, no basis for the decision to eliminate double celling is provided by this reason unless double celling is unconstitutional per se. In fact, the real basis for the District Court's decision to prohibit double celling is found, not among its listed reasons, but earlier in its opinion: "The *preferable* or *ideal* is one prisoner per cell." *Id.*, 434 F.Supp. at 1012 (emphasis added).

3. Assuming The District Court Properly Found Injuries Cognizable Under The Eighth Amendment, The Correct Remedy Is Not The Elimination Of Double Celling.

The constitutional analysis in this and other cases "does not turn on the particulars of the [prison unit] concept or design," but only on the proven unconstitutional effects of confinement. *Bell v. Wolfish, supra*, 441 U.S. at 525. The Eighth Amendment is not a vehicle by which the federal courts may legislate the "preferable" or the "ideal." "Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Id.*, 441 U.S. at 539. The reported decision of the District Court does not identify any proven constitutional violations, as discussed above.

And, regardless of whether such problems have been identified, single celling "simply is not, however, the only constitutionally permissible approach to these problems." *Id.*, 441 U.S. at 554. This Court has already held that there is no " 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment." *Id.*, 441 U.S. at 542. The State of Texas submits that neither is there any "one man, one cell" principle lurking in the Eighth Amendment's prohibition of cruel and unusual punishment.

Such considerations as whether the District Court has fashioned appropriate relief if constitutional violations were present, however, should not obscure a larger issue before this Court. The District Court, with the acquiescence of the Sixth Circuit, has "trenched too cavalierly" into matters which this Court has traditionally, and properly, reserved for the States. *Bell v. Wolfish, supra*, 441 U.S. at 554. "[U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to intially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the particular issue of whether a particular system violates any prohibition of the Constitution. . ." *Id.*, 441 U.S. at 562. Because the elusive Eighth Amendment standard of "the evolving standards of decency" has not found the kind of definition in prison conditions litigation that it received from this Court in medical mistreatment cases, *see Estelle v. Gamble, supra*, the lower courts in this case, and others, have failed to remain cognizant of this Court's repeated remonstrances that "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government." *Bell v. Wolfish, supra*, 441 U.S. at 562.

CONCLUSION

For the reasons given above, the State of Texas, as Amicus Curiae, urges this Court to reverse the decision of the Court of Appeals for the Sixth Circuit affirming the District Court's judgment and grant the relief requested by Petitioners.

Repectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

ED IDAR, JR.
Chief, Civil Rights Section
Enforcement Division
Assistant Attorney General

Kenneth L. Petersen

KENNETH L. PETERSEN, JR.
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Amicus Curiae
State of Texas

No. 80-332

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, ET AL., PETITIONERS

v.

KELLY CHAPMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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JAMES A. RHODES, ET AL., PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case involves the constitutionality of housing two prisoners in cells designed for one at an Ohio state maximum security prison, under the totality of the circumstances present at that prison.

While the United States takes no position in the case before the Court, we believe it will be useful to the Court to have some indication of current federal policy in this area and of the practices at the Bureau of Prisons, which administers the 43 federal institutions comprising one of the largest correctional systems in the country.

We are accordingly lodging with the Clerk of this Court 10 copies of the new Federal Standards for Prisons and Jails, issued by the Attorney General on

December 16, 1980. These standards, which are intended to be useful both for planning new facilities and for assessing existing ones, specify (Section 2.05) that "[i]n long term institutions, there is [to be] one inmate per cell or room", which is to have "at least 60 square feet of floor space" (Section 2.04). In addition, Section 2.02 directs that "[a]ll cells and detention rooms rated for single occupancy [are to] house only one inmate". The preamble emphasizes that, while the standards are intended to "promote practices that protect the basic constitutional rights of inmates", they "should not be taken to be a statement of constitutional minima. They confer no rights and create no legal causes of action." They do, however, express the firm federal policy that there should be no double celling in long-term correctional facilities.

The district court in this case identified five factors (Pet. App. A34–A37) upon which it based its conclusion that double celling at the state facility involved is unconstitutional: (1) the extent of overcrowding at the facility (percentage over design capacity);[1] (2) the size of the cells in which inmates are double-celled;[2] (3) the hours double-celled inmates are required to spend in their cells;[3] (4) the length of double-celled inmates'

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[1]The state facility exceeded its design capacity of 1600 by 38% at the time of trial (*id.* at A35).

[2]The cells at the state facility measure approximately 63 square feet (*id.* at A35–A36).

[3]Double-celled inmates at the state facility spend most of their time in their cells with their cellmates (*id.* at A37). Of the inmates double-celled at the state facility, 25% (320 cells) are confined to their cells for all except 2–6 hours weekly (*id.* at A18). As to the remaining 75% of the double-celled inmates (960 cells), the court at one point (*id.* at A16) states that they are locked in their cells from 9:00 p.m. to 6:30 a.m. (9½ hours), but later finds (*id.* at A17) that they are out of their cells only 10 hours a day, leaving 14 hours daily of confinement in their cells.

prison terms;[4] and (5) the degree of permanence of double-celling at the facility.[5] The attached charts, prepared by the Bureau of Prisons, provide information concerning each of these factors for the federal prison system, as well as other information the Court may find useful.

Charts I and II are relevant to the factor of the degree of permanence of the problem. Chart I shows the wide variations over time in the size of the federal prison population. The Bureau of Prisons points out that these variations arise from three factors: the level of arrests, prosecution policies,[6] and sentencing and parole decisions. The size of the prison population is accordingly difficult to predict in a time frame necessary to construct new facilities, which averages five years for a high-security facility.[7] The time and the costs required for new construction are shown in detail by Chart II.

Chart III relates to the factor of design capacity. It summarizes the extent to which federal correctional

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[4]The inmates at the state facility are "long term" prisoners (*id.* at A34). Of the 2300 inmates at the state facility at the time of trial, 67% were serving either life or first degree felony sentences (*id.* at A12). The minimum term upon conviction of a first degree felony in Ohio is 4 years, and the maximum term is 25 years. Ohio Rev. Code Ann. § 2929.11(B)(1) (Page 1975).

[5]The trend toward increased double celling at the state facility had continued for the last 4 years prior to trial (Pet. App. at A37).

[6]Particularly relevant are policies concerning the division of prosecutorial responsibility for offenses that violate both state and federal law. For example, a policy of leaving the bulk of bank robbery prosecutions to the states is reflected in the sharp drop in the federal prison population between 1977 and 1979.

[7]The new Federal Standards, *supra*, at 16, recommend that "the development and use of alternatives to incarceration be explored before new construction is pursued".

facilities exceeded their design capacities in 1975, 1979, and 1980. Finally, Chart IV summarizes the remaining three factors, indicating the extent to which federal prisoners are double-celled in cells measuring less than 63 square feet, the daily hours such prisoners must spend in their cells, and the range of their sentences. The chart shows that in December 1980, 1,292 federal prisoners—approximately 5% of the federal prison population—were double-celled in cells less than 63 square feet, the size of the cells involved in the instant case.[8] Of these 1,292 prisoners, 1,106 inmates (85.6%) were in regular housing, where they were required to spend 5 to 9½ hours a day in their cells. Those inmates were serving sentences ranging from 90 days to life. The additional 186 federal prisoners confined in double cells of less than 63 square feet were in special housing,[9] and thus confined for about 23 hours a day. Throughout the federal correctional system, 478 prisoners were confined in special housing in double cells larger than 63 square feet.[10] We did not ask the

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[8]In addition, 170 prisoners were housed in two-person cubicles of less than 63 square feet. A cubicle is a partially enclosed space defined within a dormitory by constructing removable walls approximately four and a half to six feet in height. Such cubicles are accordingly significantly less confining than the cells involved in this case.

Other federal prisoners are double-celled in cells larger than 63 square feet. In addition, the United States Penitentiary at Atlanta, Georgia, has 29 cells that are 160 square feet in size and house 8 inmates. Some institutions have cells readily available for double occupancy should a rapid increase in commitments create the need. At the Federal Correctional Institution at Lompoc, California, for example, there are 25 cells, all smaller than 63 square feet in size, equipped to confine two inmates.

[9]"Special housing" is defined in footnote 2 of Chart IV.

[10]Two hundred and thirty two of these 478 were confined in the 160 square feet, 8 person cells in Atlanta.

Bureau of Prisons to undertake the rather extensive inquiries necessary either to identify the lengths of the sentences of those confined in special housing, or to estimate how long any double-celled prisoners are likely to be so confined.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

CHART I

NUMBER OF INMATES IN FEDERAL INSTITUTIONS
IN DECEMBER 1970 - 1980

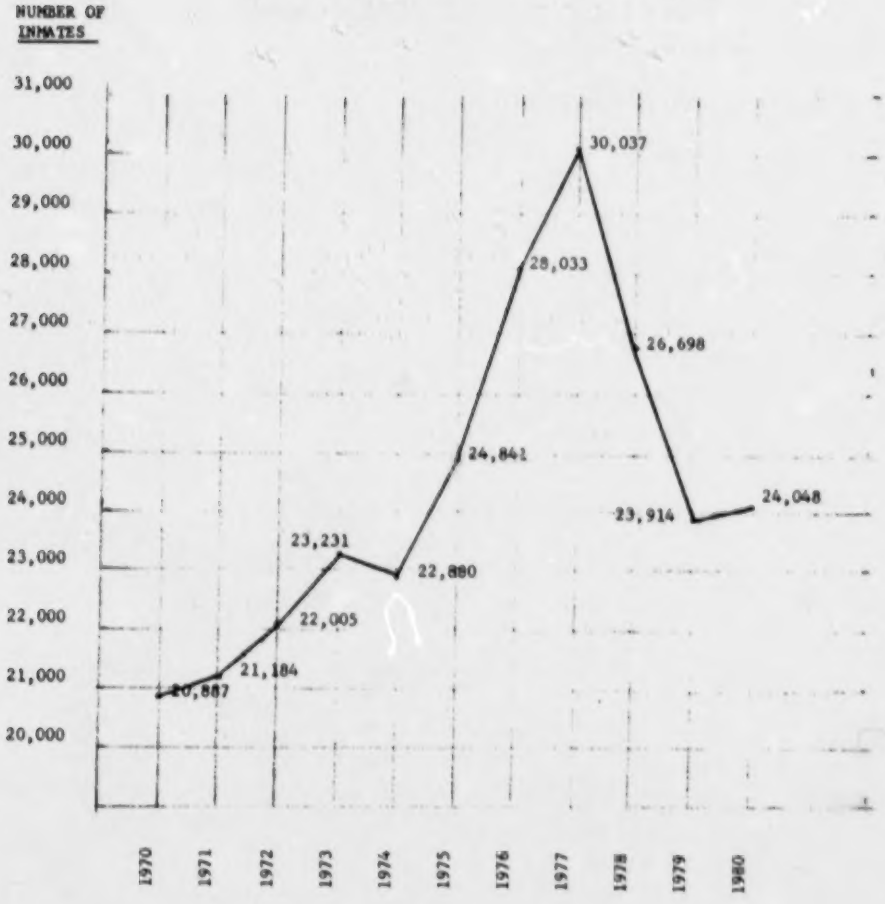

Chart II

BUREAU OF PRISONS
OFFICE OF FACILITIES DEVELOPMENT
NEW CONSTRUCTION

New Federal Institutions 1971 - Present	FY Site and Planning Done	Original Physical Capacity (By Architect Design)	Original Number of Beds	Construction Budget FY 66 - FY 80 (in thousands)	Cost Per Bed	Square Footage	Cost Per Square Foot	Const. Start	Const. Comp.
New York MCC	66-71	418	449	$14,830	$33,025	217,400	$68	12-71	3-75
Butner FCI	71-72/75	321	348	19,250	55,325	223,600	86	6-72	1-76
Pleasanton FCI	71-72	220	247	6,623	26,825	121,550	55	8-72	7-74
Chicago MCC	71-72	373	386	10,220	26,475	187,592	54	8-72	6-75
San Diego MCC	72-73	462	503	14,459	28,750	287,000	50	2-73	11-74
Miami FCI	73-74	224	244	8,700	35,650	132,728	65	2-74	1-76
Memphis FCI	73-75	419	454	11,040	24,325	185,007	60	4-75	3-77
Talladega FCI	73-77	493	538	13,480	25,050	255,470	53e	3-77	9-79
Bastrop FCI	73-75	460	501	12,851	26,650e	200,550e	60e	9-76	8-79
Otisville FCI w/camp	75-77	543e	595e	23,200	39,000e	288,955e	80e	10-76	5-80e*
Lake Placid FCI	77-77	493	538	22,000	40,900e	281,310e	78e	5-77	8-80e
North Central FCI	73	500e	550e	1,000					
Northeast FCI	73	500e	550e	1,000					
Tucson FDC	77-77	200e	204e	2,700	13,250e	40,950e	66e	9-79e	11-81e
Phoenix FCI/FDC	79-79	300	300e	15,950e	29,000e	300,000e	53e	10-80	1-83e

GRAND TOTALS: Excluding MCC's (Jails) $137,794
Including MCC's $177,303

e = estimated
* Otisville was dedicated on October 4, 1980

ADDED FACILITIES AT EXISTING SITES

	Capacity	Construction Funds	Opening Date
Boron Camp	250	500,000	4/79
Big Spring Camp	500	300,000	6/79
Danbury Camp	98	1,000,000	6/81
El Reno Camp	123	1,200,000	11/80
Leavenworth Camp Addn.	71	200,000	4/80
Texarkana Camp	122	855,000	11/80
La Tuna Housing Unit	60	900,000	12/80
Sandstone Housing Unit	95	1,110,000	8/81

CHART III

DECEMBER 1980 POPULATION OF FEDERAL CORRECTIONAL FACILITIES
WHICH ARE OVER PHYSICAL (DESIGN) CAPACITY

Institution	Current Population	Capacity	Percent Over (+), Under (-) Capacity 1980	1979	1975
FPC Allenwood, PA	385	374	+ 2.94	+ 16.04	+ 4.4
FCI Ashland, KY	531	478	+ 11.09	+ 21.07	+ 35.3
USP Atlanta, GA	1668	1505	+ 10.83	- 10.96	+ 6.9
FCI Butner, NC	341	321	+ 6.23	+ 1.56	--
CTC Dallas, TX	35	30	+ 16.07	+ 16.67	- 40.0
FCI Danbury, CT	625	511	+ 22.31	+ 21.07	+ 10.3
CTC Detroit, MI	67	54	+ 24.07	- 57.63	- 1.9
FCI Englewood, CO	461	346	+ 32.47	+ 28.17	+ 16.6
FCI Fort Worth, TX (male)*	285	278	+ 2.52	+ 10.87	- 14.5
FCI La Tuna, TX	468	363	+ 28.93	--	--
USP Lewisburg, PA (camp)	170	147	+ 15.65	+ 6.22	--
FPC McNeil Island, WA	242	200	+ 21.00	--	- 5.2
USP Marion, IL (camp)	116	98	+ 18.37	- 13.27	- 13.7
FCI Memphis, TN	479	410	+ 16.83	+ 2.95	--
FCI Miami, FL	218	214	+ 1.87	+ 65.43	--
FCI Milan, MI	523	429	+ 21.91	+ 34.43	- 5.0
FPC Montgomery, AL	226	220	+ 2.73	+ 13.12	+ 5.2
FCI Morgantown, WV	360	321	+ 12.15	+ 15.11	+ 28.4
FCI Oxford, WI	569	498	+ 14.26	+ 13.43	- 4.6
FCI Petersburg, VA	753	492	+ 53.05	+ 50.55	+ 33.1
FCI Petersburg, VA(camp)	103	37	+178.38	+ 159.46	--
FCI Sandstone, MN	374	325	+ 15.08	+ 7.62	- 6.4
FCI Seagoville, TX(camp)	302	279	+ 8.24	- 8.61	+ 9.8
FCI Talladega, AL	597	436	+ 36.93	- 88.53	--
FCI Tallahassee, FL	578	492	+ 17.48	+ 27.13	+ 28.3
USP Terre Haute, IN	848	778	+ 9.00	- 1.36	+ 31.2
USP Terre Haute, IN(camp)	230	216	+ 6.48	+ 9.05	- 7.6
FCI Terminal Island, CA	838	685	+ 22.34	+ 49.92	+ 30.2
FCI Texarkana, TX	531	429	+ 23.78	+ 27.71	+ 31.6

*FCI Fort Worth is a "co-correctional" institution, housing both male and female inmates. The female section is under-capacity.

In mid-December 1980, the entire Federal system was almost at its Physical Capacity: 24,048 inmates, with a capacity of 24,169.

CHART IV—DOUBLE-CELLING IN FEDERAL INSTITUTIONS—DECEMBER 1980

REGULAR HOUSING

INSTITUTION[1]	Total Population	Number of cells Under 63 Sq. Ft. Double-Celled	Number of Cubicles Under 63 Sq. Ft.	Hours Per Day Spent in Cells or Cubicles	Range of Sentences for Those Who Are Double-Celled
FCI, Ashland, Ky.	531	22	42	9:30 p.m.–7:00 a.m.	2 years to Life (cells)
FCI, El Reno, Okla.	820	22		9:15 p.m.–6:00 a.m.	4 years to Life
USP, Lewisburg, Pa.	984	137		11:30 p.m.–6:30 a.m.	3 years to Life
FPC, Montgomery, Ala.	226		4	10:00 p.m.–6:00 a.m.	6 months to 4 years
FCI, Milan, Mich.	523	38		9:00 p.m.–6:00 a.m.	90 days to Life
FCI, Oxford, Wis.	569	178		11:00 p.m.–6:00 a.m.	18 months to Life
FCI, Sandstone, Minn.	374		39	10:00 p.m.–6:00 a.m.	6 months to 15 years
FCI, Terminal Is., Ca.	838	71		10:00 p.m.–6:00 a.m.	6 months to 20 years
USP, Terre Haute, Ind.	848	85		1:00 a.m.–6:00 a.m.	1 year to Life

[1]FCI—Federal Correctional Institution; FPC—Federal Prison Camp; USP—U.S. penitentiary

SPECIAL HOUSING[2]

INSTITUTION	No. of Cells Under 63 Sq. Ft. Double-Celled	No. of Cells Over 63 Sq. Ft. Double-Celled
USP, Atlanta, Ga.		26 (66½ Sq. Ft.); 29 (8 inmates, 160 Sq. Ft.)
FCI, El Reno, Okla.	7 (40 Sq. Ft.)	
FCI, La Tuna, Tx.	8 (54 Sq. Ft.)	
USP, Leavenworth, Ka.		22 (176 Sq. Ft.)
USP, Lewisburg, Pa.		51 (72 Sq. Ft.)
FCI, Lexington, Ky.		2 (112, 125 Sq. Ft.)
FCI, Lompoc, Calif.	17 (50 Sq. Ft.)	
FCI, Memphis, Tn.		10 (84, 96 Sq. Ft.)
FCI, Miami, Fla.		1 (89 Sq. Ft.)
FCI, Oxford, Wis.		10 (71 Sq. Ft.)
FCI, Petersburg, Va.	9 (46 Sq. Ft.)	
Medical Center, Springfield, Mo.		1 (84 Sq. Ft.)
FCI, Terminal Island, Ca.	45 (48 Sq. Ft.)	
USP, Terre Haute, Ind.	5 (58½ Sq. Ft.)	
FCI, Texarkana, Tx.	2 (48 Sq. Ft.)	

[2] In the Bureau of Prisons, inmates are locked in their Special Housing cells about 23 hours a day. Special Housing is the confinement of those who cannot go to regular population: those requiring special protection from others, those under investigation for crimes, those awaiting trial, those being disciplined, and those awaiting transfer to more appropriate institutions.

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